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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 705

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, FIRST CONGREGATIONAL CHURCH OF PONTIAC, MICHIGAN, FIRST CONGREGATIONAL CHURCH OF WAUWATOSA, WISCONSIN, MAYFAIR CONGREGATIONAL CHURCH OF TOLEDO, OHIO, MALCOLM K. BURTON, BRUCE H. MASSELINK, ANGUS MACDONALD, HARRY R. BUTMAN, GLADYS T. KENNEDY, NORMAN S. MCKENDRICK, ROY W. ABEL, RICHARD H. PLOCK, JOHN G. PRYOR and FREDERICK GRABOW, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, JOHN T. BEACH, as Treasurer and a member of THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, THE BOARD OF HOME MISSIONS OF THE CONGREGATIONAL AND CHRISTIAN CHURCHES, THE AMERICAN MISSIONARY ASSOCIATION, THE CONGREGATIONAL HOME MISSIONARY SOCIETY, THE CONGREGATIONAL CHURCH BUILDING SOCIETY, THE CONGREGATIONAL SUNDAY SCHOOL EXTENSION SOCIETY, THE CONGREGATIONAL BOARD OF MINISTERIAL RELIEF, CONGREGATIONAL EDUCATION SOCIETY, CONGREGATIONAL PUBLISHING SOCIETY, THE ANNUITY FUND FOR CONGREGATIONAL MINISTERS, RETIREMENT FUND FOR LAY WORKERS, THE CORPORATION FOR THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, and AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS,

Respondents,

JOHN T. BEACH, as Treasurer of the NATIONAL COUNCIL OF CONGREGATIONAL CHURCHES and FRED HOSKINS and JAMES E. WAGNER, as co-Presidents of the UNITED CHURCH OF CHRIST,

Added Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
1. Judgment Sought to be Reviewed	4
2. General Nature of Action	5
3. Proceedings Below	7
4. Background of the Controversy	9
5. Proceedings in *Cadman* v. *Kenyon*	12
6. Events Since *Cadman*	14
7. The Importance of the Case	16
Reasons for Granting Writ	17
(1) The Court of Appeals Has Rendered a Decision Which Is In Conflict With Applicable Decisions of the Supreme Court, and Has Deprived Petitioners of Their Constitutional Rights of Due Process of Law	17
(2) The Courts Below Have Decided Important Questions of New York Law In a Way In Conflict With the Applicable Law of New York	23
(3) The Courts Below Have Deprived Plaintiffs of Due Process of Law In Violation of the Fifth or Fourteenth Amendments In Holding, Contrary to Decisions of This Court and the Law of New York, That They Are Bound By "Adjudications" In *Cadman* v. *Kenyon*, To Which They Were Not a Party and in Which They Were Not and Could Not Have Been Represented	33

PAGE

(4) The Court of Appeals Has Sanctioned a Course of Conduct By the District Court Which Deprived Petitioners of Procedural Due Process of Law and So Far Departed from the Accepted Course of Judicial Proceedings As to Call For the Exercise of the Supervisory Powers of This Court 37

(5) The Issues and the Legal Questions Involved in This Case are of Great and Far-reaching Importance 41

Conclusion 41

Appendix A X1

Appendix B X3

Appendix C X14

Appendix D X17

Appendix E X20

Appendix F X22

TABLE OF CASES CITED

Angel v. *Bullington*, 330 U. S. 183 (1947) 23, 33

Attorney General v. *Town of Dublin*, 38 N.H. 459 (1859) 10

Bank of Yorktown v. *Boland*, 172 Misc. 885, 16 N. Y. S. 2d 756; aff'd 259 App. Div. 987, aff'd 284 N. Y. 749 (1940) 26

B. & O. R. Co. v. *U. S.*, 298 U. S. 349 (1935) 40

Bouton v. *Van Buren*, 229 N. Y. 17, 127 N.E. 477 (1920) 37

Brenner v. *Title Guarantee & Trust Co.*, 276 N. Y. 230, 11 N.E. 2nd 890 (1937) 35, 36, 37

Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673, 679-80 (1930) 23

Cadman Memorial Congregational Soc. of Brooklyn v. *Kenyon*, 197 Misc. 124, 95 N. Y. S. 2d 133 (1950) rev. 279 App. Div. 1015, 1074, 111 N. Y. S. 2d 808 (1952), aff'd 306 N. Y. 151, 116 N.E. 2d 481 (1953) 3, 4, 7, 8, 11, 12, 14, 15, 19, 20, 21, 22, 23, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39

PAGE

City Bank Farmers Trust Co. v. *Macfadden*, 13 App. Div. 2d 395, 216 N. Y. S. 2d 215 (1st Dept. 1961) 25, 27, 31

City of New York, Matter of (A. & W. Realty Corp.), 1 N. Y. 2d 428, 154 N. Y. S. 2d 1 (1956) 26

Commercial Publishing Co. v. *Beckwith*, 188 U. S. 567 (1903) 18, 21

Cook v. *Conners*, 215 N. Y. 175, 109 N.E. 78 (1915) 25

Costello v. *U. S.*, 365 U. S. 265 (1961) 18, 20, 21

Cromwell v. *County of Sac.*, 94 U. S. 351 (1876) 18, 21, 25, 32

Fidelity National Bank v. *Swope*, 274 U. S. 123 (1927) 23

First Cong. Church v. *Evangelical and Reformed Church*, 160 F. Supp. 651 (1958); 198 F. Supp. 677 (1961) 16, 23

Davies v. *Stumpf*, 262 App. Div. 499, 31 N. Y. S. 2d 1000 (1st Dept. 1941) 32

Gart v. *Cole*, 166 F. Supp. 129, aff'd 263 F. 2d 244 (2nd Cir. 1959) 32

Good Health Dairy Products Corp. v. *Emery*, 275 N. Y. 14, 9 N.E. 2d 758 (1937) 25, 31

Gray-Lewis v. *Gray-Lewis*, not officially reported, 157 N. Y. S. 2d 815 (N. Y. Co. 1956) 26

Gudmundson v. *Thingvalla Lutheran Church*, 29 N.D. 291, 150 N.W. 750 (1915) 10

Haldeman v. *U. S.*, 91 U. S. 584 (1875) 18, 21

Hansberry v. *Lee*, 311 U. S. 32 (1940) 19, 21, 34, 35, 36, 37

Harriman v. *Northern Securities Co.*, 197 U. S. 244 (1905) 19, 21

Harrington v. *Harrington*, 290 N. Y. 126, 48 N.E. 2d 290 (1943) 26

House v. *Mullen*, 22 Wall. (89 U. S.) 42 (1874) 18, 20

Hughes v. *United States*, 4 Wall. (71 U. S.) 232 (1866) 18, 20

Israel v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N.E. 2d 97 (1956) 25, 31

Joint Anti-Fascist Refugee Comm. v. *McGrath*, 341 U. S. 123 (1950) 40

PAGE

Kittinger v. *Churchill*, 161 Misc. 3, 292 N. Y. S. 35, aff'd 249 App. Div. 703, 292 N. Y. S. 51 (4th Dept. 1936) 25

Kovarsky v. *Brooklyn Union Gas Co.*, 279 N. Y. 304, 18 N.E. 2d 287 (1938) 37

Lipkind v. *Ward*, 256 App. Div. 74, 8 N. Y. S. 2d 832 (3rd Dept. 1939) 25

Manhattan Storage & Warehouse Co. v. *Movers Assn.*, 289 N. Y. 82, 43 N.E. 2d 820 (1942) 19, 29, 30

Mullane v. *McKenzie*, 269 N. Y. 369 (1936) 31

Murray v. *Pocatello*, 226 U. S. 318 (1912) 18, 19, 20, 21, 31

People ex rel. MacCracken v. *Miller*, 291 N. Y. 55, 50 N.E. 2d 542 (1943) 26

People v. *McCanliss*, 255 N. Y. 456, 175 N. E. 129 (1931) 30

Postal Telegraph Cable Co. v. *City of Newport, Kentucky*, 247 U. S. 464 (1918) 18, 21, 33, 34

Purcell v. *Summers*, 126 F. 2d 390 (4th Cir. 1942) affirming 34 F. Supp. 421 (1940); cert. den. 317 U. S. 640 (1942) 16, 22

Ripley v. *Storer*, 309 N. Y. 506, 132 N.E. 2d 87 (1956) 31

Rudd v. *Cornell*, 171 N. Y. 114, 63 N.E. 823 (1902)....25, 27

Russell v. *Place*, 94 U. S. 606 (1876) 18, 21

St. Romes v. *Levee Steam Cotton Press Co.*, 127 U. S. 614 (1888) 18, 20

Salzman v. *Sakofsky*, 195 Misc. 166, 89 N. Y. S. 2d 39 (Bronx Co. 1949) 30

Schuylkill Fuel Corp. v. *Nieberg*, N. Y. 304, 307 (1929) 31

Siegel v. *Finnerman*, 282 App. Div. 878, 124 N. Y. S. 2d 846 (2nd Dept. 1953) 20, 28

Silberstein v. *Silberstein*, 218 N. Y. 525, 113 N.E. 495 (1916) 30

Soc. Milion Athena, Inc. v. *National Bank of Greece*, 281 N. Y. 282, 22 N.E. 2d 374 (1939) 37

Stokes v. *Stokes*, 155 N. Y. 581, 50 N.E. 242 (1898) 31

Swift v. *McPherson*, 232 U. S. 51 (1914) 18, 20

PAGE

TCF Film Corporation v. *Gourley*, 240 F. 2d 711 (3rd Cir. 1957) 38
Terner v. *City of Peekskill*, not officially reported, 124 N. Y. S. 2d 24 (1953) 20, 28
Third National Bank of Louisville v. *Stone*, 174 U. S. 432 (1899) 31
Wabash Railroad v. *Adelbert College*, 208 U. S. 38 (1908) 37
Walfrice v. *Buffalo Pottery Co.*, 176 Misc. 472, 27 N. Y. S. 2d 487 (Erie Co. 1941) 30
Watson v. *Jones*, 13 Wall. (80 U. S.) 679 (1871) 10
Weissmann v. *Euker*, 1 App. Div. 2d 30, 147 N. Y. S. 2d 101 (3rd Dept. 1955) 24
Wood v. *City of Salamanca*, 289 N. Y. 279, 45 N.E. 2d 443 (1942) 19, 29, 30

Statutes

United States Const.

Fifth Amendment 4, 33, 37
Fourteenth Amendment 4, 33, 37

28 U. S. C. §1254(1) 3
§1332 5
§2201 ..... 4, 5

Federal Rules of Civil Procedure, Rule 43(c) 9, 40

New York Civil Practice Act:

§193 ..... 4, 19, 21, 29
§472 ..... 4, 30
§473 ..... 4, 19, 21, 26, 29, 30

New York Const. Art. VI, §7 ..... 4, 26

New York Rules of Civil Practice

Rule 21f 4

Authorities

PAGE

American Law Reports:

Vol. 132, p. 750 35

Borchard, *Declaratory Judgments*, 2nd Ed. pp. 312-14, 686 16

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Vol. 7, §§186-194 25
Vol. 9, §226, p. 427 26

Moore's Federal Practice:

Vol. 3, Par. 23.04 35

Restatement of Judgments:

§77(b) 21, 25

Sweet, *Religion in America* (1942), p. 68 10

United Church Herald, Vol. 5, No. 19, p. 18 (Oct. 18, 1962) 16

Wigmore on Evidence, 3rd Ed. Vol. IX 39

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Second Circuit, entered in the above-entitled case on August 1, 1962 (Appendix A hereto, *infra*, p. X1) which affirmed the judgment of the United States District Court for the Southern District of New York, entered July 14, 1961 (9a-10a*).

Citations to Opinions Below

The opinion of the Court of Appeals is reported in 305 F. 2d 724 (Appendix B hereto, *infra*, p. X3). The opinion of the District Court (Dawson, J.) in denying defendants' motions (343a-414a) for summary judgment dismissing the complaint on the principal grounds of *res judicata* and collateral estoppel is reported in 160 F. Supp. 651 (35a-62a). The opinion of the District Court (Dimock, J.) in granting defendants' motions for a preliminary, separate trial of the defenses of *res judicata* and collateral estoppel is not officially reported (63a-71a). The opinion of the District Court (Dimock, J.), which denied plaintiffs' motion to strike defendants' affirmative defenses of *res judicata* and collateral estoppel for failure to prove a *prima facie* case and upon which judgment to dismiss the complaint was entered, is reported in 198 F. Supp. 677; (11a-34a).

Jurisdiction

The judgment of the Court of Appeals was dated and entered August 1, 1962 (*infra*, p. X2). An order granting an extension of time to and including December 29, 1962 within which to petition for certiorari was made herein by Mr. Justice John M. Harlan on October 29, 1962. The

* Numbers in parentheses, unless otherwise noted, refer to the pages of "Appendix to Plaintiffs-Appellants' Brief" in the United States Court of Appeals, consisting of Volume I, pp. 1a-422a, Volume II, pp. 1b-172b and Volume III, pp. 1c-13c, submitted with this petition.

jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Under New York law, do the defenses of *res judicata* and estoppel by judgment based upon the New York state court judgment in the case of *Cadman* v. *Kenyon* justify a dismissal of, and preclude a trial on the merits of, the complaint here?

(2) Were all the issues raised by plaintiffs in this action finally determined and adjudicated in *Cadman* v. *Kenyon?*

(3) Were the interests of each and all the plaintiffs in this action, and of the classes they represent, so adequately represented by the plaintiff in *Cadman* v. *Kenyon* as to bind them by the adjudication of that case?

(4) Are all the defendants in this action entitled to claim the benefits of the adjudication in *Cadman* v. *Kenyon* against all of the plaintiffs herein under the doctrines of *res judicata* and estoppel by judgment?

(5) Have the plaintiffs been deprived of their constitutional rights of due process of law by the decisions below holding that (a) all of the issues herein were finally determined and adjudicated in *Cadman* v. *Kenyon*, and (b) the interests of each and all of the plaintiffs here were represented by the sole plaintiff in *Cadman* v. *Kenyon* with such adequacy as to bind them by the decision in that case, and (c) the defendants in this action are entitled to assert the decision in *Cadman* v. *Kenyon* as a bar to this action although they are not bound by that decision.

(6) Have the plaintiffs herein been deprived of their constitutional rights of due process of law by the proceedings and procedures below?

Statutes Involved

The constitutional provisions and statutes which the case involves are: U. S. Const. Amends. V and XIV, §1; Declaratory Judgment Act, 28 U. S. C. §2201; N. Y. Const. Art. VI, §7 (McKinney's Consolidated Laws, Book 2, Part 2, p. 104); N. Y. Civil Practice Act, §§193, 472, 473 (Gilbert-Bliss Civil Practice of New York Annotated, Book 3 A, p. 35; Book 4, pp. 4, 5); Rule 211 of N. Y. Rules of Civil Practice (Gilbert-Bliss Civil Practice of New York Annotated, Book 10 B, p. 145). They are printed in Appendix F hereto, *infra*, pp. X224.

Statement of the Case

1. Judgment Sought to be Reviewed

The judgment of the Circuit Court of Appeals (Appendix A, hereto, *infra*, p. X1), sought to be reviewed, affirmed the final judgment (9a-10a) of the District Court (Dimock, J.) dismissing the complaint (72a-112a) as amended (165a-169a) and supplemented (170a-182a), without costs, as to all defendants "on the ground that the matters stated therein have been previously adjudicated against all of the plaintiffs herein individually and against each and every class represented by said plaintiffs by the final adjudication on the merits rendered by the Court of Appeals of the State of New York on the 3rd day of December, 1953 in a certain action entitled *"Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated,* against

Helen Kenyon as Moderator of the General Council of the Congregational Christian Churches of the United States." (See, 197 Misc. 124 (1950); rev. 279 App. Div. 1015, 1074 (2nd Dept., 1952); aff'd 306 N. Y. 151, reargument denied, 306 N. Y. 851 (1953).)

The pleadings, opinions, dissenting opinions, orders and judgments in the *Cadman* case were printed below and are submitted herewith.* Because of their especial importance, there are reprinted in this petition, the judgment entered June 3, 1952 on the order of reversal of the Appellate Division (Appendix C hereto, *infra*, p. X14), the order and judgment of the New York Court of Appeals (Appendix D hereto, *infra*, p. X17) and the final judgment entered thereon (Appendix E hereto, *infra*, p. X20) affirming that judgment of June 3, 1952.

2. General Nature of Action

This is an action for a declaratory judgment. Its nature appears more fully from plaintiffs' complaint (72a, 165a, 170a), and statements (248a-342a) filed pursuant to pre-trial orders (242a-245a).

Jurisdiction of the District Court was based on the Federal Declaratory Judgment Act (28 U.S.C. §2201) and diversity of citizenship of parties (28 U.S.C. §1332).

Plaintiffs, suing individually and on behalf of others now similarly situated, are four Congregational Christian Churches and ten individuals, including ministers and members of Congregational Christian Churches, members of defendant General Council of the Congregational Christian Churches and of defendant National Council of Congregational Churches, members of defendant The

* See Vol. II "Appendix to Plaintiffs-Appellants' Brief", pp. 1b-172b.

Annuity Fund for Congregational Ministers and members of corporate boards of other defendant Congregational denominational corporations.

Defendants are Evangelical and Reformed Church, "United Church of Christ" and 13 national, denominational agencies of the Congregational Christian Churches.

This case arises out of a proposed total union, pursuant to a written agreement hereafter mentioned, of the Congregational Christian Churches of the United States and the Evangelical and Reformed Church to form a new denomination called "United Church of Christ", and the actions taken by the defendants to effect such union. This proposed "union", actually, has resulted in a widespread "schism" among the Congregational Christian Churches, many of which have vigorously opposed the "union". The non-assenting, non-uniting group, including plaintiff churches, believes this "United Church of Christ" represents a fundamental departure from basic, historic Congregational polity and principles.

This suit seeks a declaratory judgment determining questions as to the validity, construction and effect of certain provisions of said written agreement, "The Basis of Union of the Congregational Churches and the Evangelical and Reformed Church" with "Interpretations" (112a); and determining questions in respect of the rights, status and legal relations of plaintiffs and those similarly situated, arising out of that agreement and acts taken by defendants in connection with, and since, the formation of defendant "United Church of Christ", and in respect of the several Congregational defendants and their funds, now in excess of $100,000,000, including their rights to participate in the direction, control and use of said funds and in direction, control, activities, functions and services of said organizations.

The specific relief sought is set forth in the complaints (72a; 169a; 182a) and "Statement of Declaratory Relief Requested" (319a-342a).

3. Proceedings Below

The complaint was filed June 20, 1957 (72a-112a). Defendants' motions (343a-414a) for summary judgment dismissing the complaint on various grounds, including *res judicata* and collateral estoppel based on the *Cadman* decision and record, were denied by the District Court (Dawson, J.), with a full opinion (35a-62a; 160 F. Supp. 651), holding, *inter alia:* the parties plaintiff and defendant and the issues herein are different from those in *Cadman;* the adjudication in *Cadman* was not binding upon, or a basis of *res judicata* as to, defendant Evangelical and Reformed Church or any of defendant Congregational corporate boards, as they were not parties there; this is a particularly appropriate action for a declaratory judgment, since it involves "substantial rights of many parties from many different states", and does not deal with "purely ecclesiastical matters which this Court may not consider" but with "substantial civil rights and rights of property".

Defendants then filed answers (113a, 139a, 157a), pleading as affirmative defenses, *res judicata* and collateral estoppel (134a-136a, 149a-150a, 163a, 204a-205a, 234a-236a). The pleaded, prior "determinations" and "adjudications" consist of paraphrasings of statements in the majority *opinion* of the Court of Appeals in *Cadman* (*not* adjudications in the *judgment*). The case was assigned to District Judge Dimock for trial. He granted defendants' motions for a preliminary, separate trial of said defenses (63a).

During extensive pre-trial proceedings the District Court, over plaintiffs' objections, issued three pre-trial

orders (242a, 246a, 247a), pursuant to which plaintiffs filed statements of issues (248a), of plaintiffs' interests in funds and otherwise (277a, 285a) and of facts different from those in *Cadman* (293a).

The District Court summarily abandoned the pre-trial proceedings before completion thereof and without entering an order as to its effect (R. 5897-8)* and ordered commencement of the separate trial. Thereon, defendants offered only the *Cadman* record (R. 17) and rested. Plaintiffs then moved (R. 17-22) to strike the affirmative defenses for failure of defendants to establish a *prima facie* case.

After six days of argument, the District Court permitted defendants to re-open (R. 845), and to introduce, as additional "proofs", defendants' Exhibits G through N, but no testimony, and to again rest (R. 979). Plaintiffs moved, again (R. 982), to strike said defenses. (The District Judge had previously ruled in the pre-trial proceedings that these very exhibits would be admissible as part of plaintiffs' case as proof of alleged "new facts", since *Cadman*, creating new issues.)

The District Court thereafter rendered an opinion denying the motion and ordering "formal resumption" of the separate trial (5a, 11a-34a).

Plaintiffs were accorded merely a *pro forma* "trial". When plaintiffs presented their first witness (R. 2084) the District Judge refused to let him be sworn. He subsequently ruled that none of plaintiffs' witnesses would be permitted to testify (R. 2276, 2279) and none of plaintiffs' documentary evidence would be received (R. 2279); and even denied plaintiffs' request to make a separate record

* "R." refers to the Record on Appeal in the United States Court of Appeals certain parts of which, submitted with this petition, were handed up with the permission of the Court of Appeals in lieu of being printed in the appendices to Plaintiff-Appellants' Briefs.

of their evidence offered, pursuant to Rule 43(c) F.R.C.P. (R. 2291).

The District Court thereupon dismissed plaintiffs' action (R. 2303), precluding plaintiffs from a trial on the merits, and adopted as its final opinion, without amendment, the opinion (11a) denying plaintiffs' said motion. The judgment of dismissal (9a) entered thereon stated that the Court's opinion consituted findings of fact and conclusions of law. Plaintiffs appealed. That judgment was affirmed by the Court of Appeals.

4. Background of the Controversy

Fundamental to an understanding of this controversy is the basic difference in "polity", or form of church government, between Congregational Christian Churches, represented here by plaintiff churches, and defendant Evangelical and Reformed Church.

Congregational Christian Churches are individual autonomous churches, associated in fellowship and known collectively as "The Congregational Christian Churches of the United States". These churches number approximately 5,700. Though often referred to as a "denomination", this communion of churches is not, and never has been, a "denomination" in the sense of a national, unitary, centrally-controlled, creedal, church or denomination.

Part of this communion or "denomination" long has been certain corporations and unincorporated associations (defendants herein) created, supported and maintained by those Churches for purposes of fellowship, cooperation and counsel and as their own agencies in particular and extended fields of their church work, such as home and foreign missions, pensions, publishing, education and church building. One of these is the General Council, the national cooperative and advisory agency of said

Churches. Neither this body, nor any other, has authority to act for or to bind the Churches, individually or collectively, in a matter of church union, or otherwise.

It is basically this feature of its congregational "polity", rather than any other theological or doctrinal beliefs, which distinguish the Congregational Christian Churches from other denominations. Within this voluntary framework, each church is free to adopt its own creed (if any) or constitution, and is not subject to any creed, constitution or control imposed by any other body.

Congregationalism and the Congregational Churches in America began the day the Pilgrims landed at Plymouth on December 21, 1620, whose primary purpose and concern in coming to America was to preserve their peculiar type of church polity, which they believed was the only kind sanctioned by the Bible (*Religion in America*, by William W. Sweet, 1942, at p. 68).

The Evangelical and Reformed Church, on the other hand, is an organization with a typical Presbyterian type of polity. It is a national, incorporated, monolithic, creedal church body having an overhead, central government with legislative, judicial, administrative and ecclesiastical functions and powers. Its constitution and by-laws govern the entire denomination and is the fundamental law of the church, establishing a framework of authority which is binding upon all its ministers, members and congregations and which is exercised through a hierarchical system of judicatories (112a).

The basic differences between Presbyterial and Congregational forms of church government were described in *Watson* v. *Jones*, 13 Wall. (U. S.) 679 (1871); see also, *Attorney General* v. *Town of Dublin*, 38 N. H. 459, 517 (1859) and *Gundmundson* v. *Thingvalla Lutheran Church*, 150 N. W. 750, 29 N. D. 291, 310 (1915).

In January 1947 a joint committee representing defendant General Council of the Congregational Christian Churches and defendant Evangelical and Reformed Church published, for consideration of the two communions, said document or "articles of agreement", called "The Basis of Union of The Congregational Christian Churches and The Evangelical and Reformed Church" (112a, 82a-83a). This was supplemented by the "Interpretations" thereof (112a; 82a-83a).

This document provided for the union of *all of the Congregational Christian Churches*, congregational in polity and *approximately 5,700 in number*, with the Evangelical and Reformed Church, presbyterial in polity, to form a new denomination to be called "United Church of Christ". It provided for a total, organic union of these two communions or "denominations" and their respective members, ministers, boards, commissions, agencies and instrumentalities, into said new, single denomination and church (83a).

It did not contemplate, or provide for, a "union" of said General Council and the Evangelical and Reformed Church, to form the "United Church of Christ".

It did not contemplate that any of the Congregational Christian Churches, members or ministers would *not* become part of the United Church of Christ, or make any provision for such a contingency.

It did not provide for any equitable allocation or division of said national, denominational boards and agencies of the Congregational Christian Churches or of the funds and assets thereof as between the uniting and the non-uniting Congregational Christian Churches.*

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* Following *Cadman*, a committee of experts appointed the General Council to study the principles and polity of Congregationalism, submitted its unanimous report, stating, *inter alia*, that the Congregational Christian Churches have "common property rights" in the funds and properties of their national denominational boards and agencies (defendants here); in the event a majority of such Churches

Recognizing its lack of authority to act on this proposal for the Congregational Christian Churches, the General Council submitted "The Basis of Union" to a vote under "procedures", devised by it and printed in said "Basis", by which it would not vote approval of the union unless 75% of the Congregational Christian Churches, church members, associations and conferences voting had already voted approval. It *never* received the approval of 75% of the Churches or church members voting. Of the then 5,715 Congregational Christian Churches, 2,595, or 46%, either voted "no" (1,162) or did not vote (1,433), and only 3,120, or 54%, voted "yes" (78b).

Despite its failure to obtain greater support for the union, the General Council proceeded to "deem" the vote a "sufficient mandate"; and, just prior to the commencement of the *Cadman* case, it voted to approve the union and was taking steps to consummate same. Such consummation was temporarily halted by the granting therein of a preliminary injunction, and, after trial, of a permanent injunction.

5. Proceedings in *Cadman* v. *Kenyon*

The *Cadman* action was for a declaratory judgment and consequential injunctive relief, brought on April 18, 1949 in New York Supreme Court, Kings County, by Cadman Memorial Congregational Society of Brooklyn, a religious corporation, and Cadman Memorial Church, an unincorporated religious society (together constituting the "Cadman Church", a single, church entity) against said General

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vote to enter a union and a minority thereof decide not to do so, it is not clear which group is entitled to status as the "Congregational Christian Churches"; and in the event of such a union, a fair and equitable arrangement and division should be made concerning such properties now enjoyed in common by the Congregational Christian Churches and concerning ministerial and local church rights and standing (300a-302a).

Council, an unincorporated association, sued in name of its presiding officer, Helen Kenyon. These were the only two parties.

The complaint (1b-55b) sought relief against the General Council alone. The requested declarations related to the power and authority of the General Council to effect the then proposed union of communions provided for in the "Basis of Union" and "Interpretations", and to the rights, status and relations of non-assenting Congregational Christian Churches in respect of the acts taken and threatened by the General Council in connection with that union, as so proposed.

Defendant counterclaimed for a declaratory judgment (69b-72b), also requesting declarations (70b-72b) concerning the power and authority of the General Council and the rights, status and relations of such churches in respect of said acts of the General Council.

After trial, the Supreme Court (Steinbrink, J.) rendered a decision and opinion (77b-110b; 197 Misc. 124) granting judgment on the merits to plaintiffs. This opinion, by stipulation, constituted findings of fact and conclusions of law (111b). A declaratory judgment was thereon entered (111b-118b) containing various declarations (112b), some requested by plaintiff and some by defendant, and an injunction against the General Council (115b).

Defendant appealed. The Appellate Division, Second Department, one justice dissenting, reversed the judgment, on the law and the facts, and dismissed both plaintiffs' complaint and defendants' counterclaim (279 App. Div. 1015, 1074 (2nd Dept.), 1952; and see: 120b, 125b, 136b, 142b).

Defendant General Council then moved to resettle the order of reversal so it would contain specified "findings of fact and conclusions of law" embodying the statements in the majority opinion, and a dismissal "on the merits"

(127b, 128b, 131b-134b). This motion was unanimously denied (135b).

On June 3, 1952 a judgment of reversal was entered thereon (Appendix C hereto, *infra*, p. X14; 145b-147b).

Plaintiffs appealed to the New York Court of Appeals. That Court, two judges dissenting (306 N. Y. 151), affirmed the judgment of the Appellate Division, without costs, in an opinion rendered December 3, 1953 (148b-159b), with a dissenting opinion (159b-165b).

On that Court's order and judgment of affirmance (Appendix D hereto, *infra*, p. X17; 166b-168b), a final judgment was entered in Supreme Court, Kings County (Appendix E hereto, *infra*, p. X20; 171b-172b).

The appellate courts, in *Cadman*, refused the declaratory judgment for lack of jurisdiction caused by the absence of parties deemed indispensable in such an action.

It is on their construction of statements in the *opinion* of the Court of Appeals in *Cadman* that defendants here have based their defenses of *res judicata* and collateral estoppel.

6. Events Since *Cadman*

The final decision in *Cadman* was on December 3, 1953. The factual situation therein was that which existed when that action was commenced in April, 1949.

Many events and actions material to the issues herein have since occurred. (See plaintiffs' pleadings, 72a, 165a, 170a; Statement of Facts, 293a-317a.)

For example: At the "Uniting General Synod" meeting in June 1957, the General Council purported to unite *itself* with the Evangelical and Reformed Church, to form the new, defendant "United Church of Christ". Contrary to the "Basis of Union", this was not a union of "communions" and the persons who purported to form it were

not "the regularly constituted representatives of the Congregational Christian Churches", as required, but merely delegates of the General Council (172a, *et seq.*, 304a); and the General Council had no authority to effect such a union or to join another denomination.

A "Constitution and By-Laws" were subsequently adopted for said United Church of Christ (Defs. Ex. G), (not merely for the General Synod thereof), which established a presbyterial not a congregational form of church government and departed fundamentally from the provisions and *principles* in the "Basis of Union" and "Interpretations" (305a), all contrary to assurances given by the defendant in *Cadman*.

Defendant corporate boards of the Congregational Christian Churches, with total assets in excess of $100,000,000 changed their constitutions and by-laws to become the agencies of said "United Church of Christ". They abandoned their services to the Congregational Christian Churches and deprived plaintiffs, and those similarly situated, of all participation in, direction of, and benefit from, these organizations and their funds, unless they joined "United Church of Christ". They used funds accumulated as Congregational Christian Church agencies for said United Church of Christ, without approval of those churches (174a, 179a, 314a). Defendant National Council of Congregational Churches transferred its funds of approximately $100,000, including trust funds, so as to place them under the direction and control of said "United Church of Christ" (165a-166a, 313a).

Said "United Church of Christ" has adopted a "statement of faith" and professes, in its Constitution creedal and doctrinal beliefs, contrary to Congregational polity and beliefs.

7. The Importance of the Case

This case presents questions national in importance, scope and effect. Its final outcome will directly affect approximately 5,700 churches located throughout this country and over one and one-quarter million members, comprising the historic Congregational Christian Churches of the United States. The official organ of defendant United Church of Christ concedes (Vol. 5, No. 19, p. 18 "United Church Herald", Oct. 18, 1962) that as of October 18, 1962, at least 1,365 Congregational Christian Churches have failed or refused to become part of the United Church of Christ; and they and their ministers and members numbering hundreds of thousands are situated similarly as the plaintiffs herein. In addition to vital and far-reaching questions of status and legal relationships, as between the uniting and non-uniting groups, the property rights sought to be determined include funds and assets held or controlled by defendant boards and agencies of the Congregational Christian Churches, now in excess of $100,000,000.

Now that a wide-spread "schism", instead of a complete "union" of Churches, has actually occurred, this raises questions as to which group of such Churches constitutes the true "Congregational Christian Churches", and what are the rights, legal relations and status of each group in respect of said Congregational Christian Church agencies and boards, their services and their tremendous funds and assets. This is a peculiarly fitting case for determination under the Federal Declaratory Judgment Act. (See *Purcell, et al.* v. *Summers*, 126 F. 2d 390, 393-394 (4th Cir. 1942), aff'ing 34 F. Supp. 421 (1940); cert. den. 317 U. S. 640; *Borchard, Declaratory Judgments*, 2d Ed. pp. 312-14, 686; Judge Dawson's opinion below (53a; *First Cong. Church* v. *Evangelical and Reformed Church*, 160 F. Supp. 651.)

Plaintiffs believe this case is one of first impression as to its major substantive and procedural legal issues. The

doctrines of *res judicata* and collateral estoppel have never been so drastically and sweepingly applied. Important due process of law issues are involved. There is no dispute that the Congregational Christian Churches are autonomous and have historically banded together to establish, support and maintain agencies for their national and international church work and projects, such as home and foreign missions, publications, religious education, church building and loans and pension plans. There is, in this, no "national church" or overhead ecclesiastical body. One substantive issue of first impression is whether the national boards and agencies of the Congregational Christian Churches by their own actions can transfer their control, functions, benefits and funds to a new or different denomination, free from any obligation or responsibility to those Churches, ministers and members who choose to continue as Congregational Christian Churches. The determination of this issue affects not only the Congregational Christian Churches, but all denominations governed by Congregational polity, such as Baptists (91,931 churches, 21,374,126 members), Unitarian Universalists (665 churches, 151,557 members), and Disciples of Christ (8,001 churches, 1,801,821 members).

Other suits, arising out of this "union" and "schism," are pending in several states.

Reasons For Granting Writ

(1) The Court of Appeals Has Rendered a Decision Which Is In Conflict With Applicable Decisions of the Supreme Court, and Has Deprived Petitioners of Their Constitutional Rights of Due Process of Law.

Decisions of this Court have established the rule of law that in order for a judgment to constitute a bar to another suit, it must be determined on the merits and "if the first suit was dismissed for defect of parties or the want of

jurisdiction, or was disposed of on any other grounds which do not go to the merits of the action, the judgment rendered will prove no bar to another suit", *Costello* v. *U. S.*, 365 U. S. 265, 286 (1961); *Hughes* v. *U. S.*, 4 Wall. 232, 237 (1866); *House* v. *Mullen*, 22 Wall. 42, 46 (1874); *Swift* v. *McPherson*, 232 U. S. 51, 56 (1914); *St. Romes* v. *Levee Steam Cotton Press Co.*, 127 U. S. 614, 619 (1888); *Murray* v. *Pocatello*, 226 U. S. 318, 323-4 (1912).

This Court has ruled that there must be at least one adjudication of the rights between the parties before there can be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit; and that such a right has been adjudged "must appear affirmatively" in the first suit. *Haldeman* v. *U. S.*, 91 U. S. 584, 585-6 (1875); *Costello* v. *U. S.*, 365 U. S. 265, 285 (1961).

Furthermore, under decisions of this Court, in order for a judgment to constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on the merits, *Costello* v. *U. S.*, *supra*; and the judgment in a prior action can operate as an estoppel only as to matters in issue actually litigated *and* determined in a prior action, *Cromwell* v. *County of Sac.*, 94 U. S. 351 (1876); *Commercial Publishing Co.* v. *Beckwith*, 188 U. S. 567 (1903); *Russell* v. *Place*, 94 U. S. 606 (1876).

Under decisions of this Court due process of law is particularly pertinent to an attempt to dispose of a litigation on the issues of *res judicata* or collateral estoppel. There is a *prima facie* denial of due process if a party sought to be bound by the assertion of the plea was not, in fact, a party or privy to the prior adjudication. *Postal Telegraph Cable Co.* v. *City of Newport, Kentucky*, 247

U. S. 464, 472, 474-5 (1918); *Hansberry* v. *Lee*, 311 U. S. 32 (1940).

This Court has decided that if a court is without power or jurisdiction, for lack of parties or otherwise, to grant the relief prayed for, whatever the merits of the action might be, it could not decide what the merits were, and a judgment of dismissal therein cannot be made *res judicata* by reason of references in an opinion in which the court expresses its views on the merits *Murray* v. *Pocatello*, 226 U. S. 318, 323 (1912); *Harriman* v. *Nothern Securities Co.*, 197 U. S. 244, 291 (1905).

The decisions below of the Court of Appeals and the District Court are in direct conflict with the above applicable and controlling decisions of this Court and have resulted in a violation of plaintiffs' constitutional rights of due process of law.

The *Cadman* action, both as to plaintiff's complaint (15b-17b) and defendant's counterclaim (69b-72b), was for a declaratory judgment of certain rights and legal relations of the parties thereto (N. Y. Civ. Prac. Act §473). Both the complaint and counterclaim were dismissed, for the New York Courts' lack of jurisdiction and power to grant such a declaratory judgment in the absence of indispensable parties. This "appears affirmatively" and is obvious from both the majority and minority opinions in the Appellate Division (138b, 139b; 279 App. Div. 1074, 1075-6) and in the Court of Appeals (159b, 162b-163b; 306 N. Y. 151, 167).

In dismissing that action on this ground, both appellate courts cited and applied the rule of *Manhattan Storage and Warehouse Co.* v. *Movers Association*, 289 N. Y. 82, 88 (1942) and *Wood* v. *City of Salamanca*, 289 N. Y. 279, 282 (1942); N. Y. Civ. Prac. Act §193, that the Court must refuse a declaratory judgment where all persons who are interested in, or might be affected by the enforcement of

"rights" and "legal relations" and "whose absence will prevent an effective determination of the controversy" are not parties to the action and did not have opportunity to be heard. In so dismissing the *Cadman* action for that reason the New York appellate courts adopted the very position taken throughout the proceedings therein by the defendant, in its motions to dismiss and briefs (383a-386a; 405a-414a). Moreover, this is the precise rule of New York law for which the *Cadman* case has since been cited *Terner* v. *City of Peekskill*, 124 N. Y. S. 2d 24 (1953); *Siegel* v. *Finnerman*, 282 App. Div. 878 (2nd Dept., 1953).

The dismissal in *Cadman*, therefore, was not, and could not have been, on the merits. This is clear, too, from the face of the judgments therein. The order and judgment of the New York Court of Appeals did not "adjudicate" a dismissal on the merits, but simply affirmed the judgment entered upon the Appellate Division's decision and order (171b-172b; Appendix D, hereto, *infra*, p. X17). The Appellate Division's order and judgment did not adjudge the dismissal of the complaint or of the counterclaim to be on the merits (144b, 146b; Appendix C, hereto, *infra*, p. X14); and that Court expressly and unanimously refused, on defendant's motion, to make the dismissal of the complaint "on the merits" (127b, 131b, 134b, 135b-136b).

Thus, the decisions in the court below on this point are in direct conflict with the controlling decisions of this Court in the *Costello*, *Hughes*, *House*, *Swift*, *St. Romes* and *Murray* cases, *supra*.

The parties plaintiff, as well as the parties defendant, in this action are not the "same" as those in *Cadman* (District Judge Dawson correctly so ruled herein in denying summary judgment (49a-50a), but the Court of Appeals and the District Court erroneously held otherwise).

The issues or "points of controversy" in *Cadman* were not the "same" as those herein and were not "determined on the merits". The matters in issue herein were not "actually litigated *and* determined" in *Cadman*. Even the limited issues litigated in *Cadman* were not "determined" therein. As noted, the appellate courts in *Cadman* specifically held that absence of indispensable parties "prevented an effective determination of the controversy" or the granting of declaratory judgment relief requested by both parties (N. Y. Civ. Prac. Act §§193, 473; cf. *Costello*, *Cromwell*, *Commercial* and *Russell* cases, *supra*).

In holding that the various plaintiffs in this action are bound by, although none of them were parties in, *Cadman*, the Courts below are in conflict with the decisions of this Court in the *Hansberry* and *Postal Telegraph* cases and have misapplied the legal principles of those cases which are rightly applicable to this suit.

Since a declaratory judgment was refused in *Cadman* for lack of jurisdiction due to absence of parties, there has not been "at least one adjudication" of the "rights" and "legal relations" of the parties thereto, let alone of the "rights" and "legal relations" of the parties to this action (cf. *Haldeman*, *supra*, and *Costello*, *supra*; and *Restatement of Judgments*, Section 77b).

Since the New York Court of Appeals, for lack of power and jurisdiction to grant a declaratory judgment, could not determine the merits of the *Cadman* action, the Courts below could not make the judgment dismissing that action *res judicata* here on the basis of references in that Court's opinion relating to the merits of the action; and yet that is what they have done (cf. *Murray* and *Harriman* cases, *supra*).

The net effect of the decisions below has been to whipsaw, between the state and federal courts, churches, min-

isters and members, legitimately seeking a declaratory judgment of their "rights" and "legal relations", in respect of the situation which has arisen out of the aforesaid "union" of communions and the resultant "schism" among the Congregational communion.

In *Cadman*, the Cadman Church was denied a declaration and adjudication of its rights and legal relations by the state court for lack of power and jurisdiction, more especially, because of the absence there, as parties, of the Congregational corporate boards and agencies, the Evangelical and Reformed Church and the "United Church of Christ" (now defendants herein). Those were the very parties which the defendant and the courts in *Cadman* asserted had to be before the court before such a declaratory judgment could be granted (138b, 159b, 162b; 382a-386a, 405a-414a). In *Cadman*, the state courts specifically stated that such rights and legal relations should be determined, and that the declaratory judgment remedy would be "available", in an "appropriate action" in which such parties would be brought before the court (159b, 163b, 138b-139b).

The plaintiffs in this action complied with that mandate of the New York courts in *Cadman* and brought this "appropriate action" in which all of those parties were named as defendants and the plaintiffs herein allege civil and property rights and interests, including those in the defendant Congregational corporate boards and their funds, entitling them to a declaratory judgment of their rights and legal relations. *Purcell* v. *Summers*, 126 F. 2nd 390 (4th Cir. 1942); cert. den. 317 U. S. 640 (1942). On the one hand, in *Cadman*, relief was denied because of absence of necessary, affected parties. On the other hand, below, declaratory relief has been denied on the ground that *Cadman* is *res judicata* as to all parties, plaintiffs

and defendants, and as to all issues raised by the pleadings herein.

The denial in this second suit, on grounds of *res judicata* and collateral estoppel, of the very remedy which, in the first suit, the state courts said would be available" in such an "appropriate action", is clearly a denial of due process of law under the Federal Constitution and the above decisions of this Court (See, also, *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 679-80 (1930).

(2) The Courts Below Have Decided Important Questions of New York Law In a Way In Conflict With The Applicable Law of New York.

Jurisdiction being conferred by diversity of citizenship, the Courts below were required to follow the law and policy of New York as to the scope and elements of *res judicata* and collateral estoppel, as asserted defenses. *Angel* v. *Bullington*, 330 U. S. 183 (1947); *Fidelity National Bank* v. *Swope*, 274 U. S. 123, 130-31 (1927).

The United States Court of Appeals affirmed, without comment, the holding of the District Court that "the matters of fact and law necessarily determined by the Court of Appeals in reaching its conclusion that the plaintiffs were not entitled to the declarations and injunctive relief sought constituted adjudications binding upon the litigants". *First Congregational Church* v. *Evangelical & R. Ch.*, 198 F. Supp. 677, 679 (1961). These assumed "determinations" were held to encompass the wide spectrum of issues raised by all of the plaintiffs in this suit. In so holding, the Courts below decided important questions of local law in a way in conflict with applicable New York decisions and with the law of the *Cadman* case itself.

The stated basis for the dismissal of this suit by the Courts below is the decision and "determination" in *Cad-*

man The judgment of the Appellate Division in *Cadman*, affirmed by the New York Court of Appeals, states there were questions of doctrine, polity and ecclesiastical matters determined in the declaratory judgment of the trial court which "were not considered by said Appellate Division and as to which it has made no determination" (146b; Appendix C hereto, *infra*, p. X15). However, the District Court predicated its dismissal of this suit on the ground that the New York Court of Appeals had "necessarily determined" the issues herein in respect of the "Basis of Union" (13a-14a). Yet those are the very matters of doctrine and polity which were expressly left undecided by the New York Courts. Now, the U. S. Court of Appeals has held that it is unclear and doubtful whether such issues were determined or avoided by the N. Y. Court of Appeals (Appendix B hereto, *infra* p. X12*).

Under New York law, the N. Y. Court of Appeals did not, and could not, have determined such issues on the merits; but, actually, the ground of any such determination would have made a material "difference". A determination for lack of cognizance (or jurisdiction) would not be on the merits, but would be the very antithesis thereof. *Weissman* v. *Euker*, 1 App. Div. 2d 30, 147 N. Y. S. 2d 101 (3rd Dept. 1955). Yet, even in face of this admitted doubt, the Circuit Court of Appeals has held that plaintiffs are not entitled to have such issues determined in this action.

Under New York law, the doctrine of collateral estoppel is that where a second suit is based upon a different cause

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* "While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil Courts, it would make no difference to the resolution of the issues presented here which of these grounds of decision was in fact adopted."

of action, the prior judgment will operate as a bar between the same parties only to estop the relitigation, collaterally, of those specific matters placed in issue *and* actually determined in the prior action. *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14, 17, 18 (1937); *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116 (1956); *Rudd* v. *Cornell*, 171 N. Y. 114 (1902); *Cook* v. *Conners*, 215 N. Y. 175 (1915); *City Bank Farmers Trust* v. *Macfadden*, 13 A. D. 2d 395 (1st Dept. 1961); *Lipkind* v. *Ward*, 256 App. Div. 74 (3rd Dept. 1939); 7 Carmody-Wait New York Practice, §§186-194. The Federal rule is the same, as noted above. *Cromwell* v. *County of Sac.*, 94 U. S. 351 (1876).

There was no foundation for a defense of estoppel by judgment here because, under New York law, there was no prior judgment determining the merits of the issues in this suit. The Courts below have construed the *opinion* of the New York Court of Appeals in *Cadman* v. *Kenyon* as a declaratory judgment. There are a number of reasons why this is not permissible under New York law as expressed in its statutes and by decisions of its highest courts.

The *Cadman* action was for a declaratory judgment and defendant therein counterclaimed for declaratory judgment. The rule in New York is the general rule, that in declaratory judgment actions no adjudications are deemed made unless expressed in declarations found in a judgment. *Kittinger* v. *Churchill*, 161 Misc. 3, 13, 14 (1936), aff'd 249 App. Div. 703 (4th Dept. 1936); *Restatement of Judgments*, Section 77(b). The New York Court of Appeals affirmed the Appellate Division's dismissal of defendant's counterclaim, as well as plaintiffs' complaint and no declaratory *judgment* on any subject or issue was made or granted in *Cadman*.

In and of itself, the dismissal of a complaint which seeks a determination of rights in the form of a declaratory judgment does not determine the rights of the parties, especially a dismissal for want of jurisdiction or parties. *Gray-Lewis* v. *Gray-Lewis*, 157 N. Y. S. 2d 845, 816 (1956). Moreover, the Appellate Division in *Cadman* unanimously and specifically denied defendant's motion to have the dismissal constitute such a determination (127b-136b).

Also, the New York Court of Appeals has no power to grant a declaratory judgment. It cannot do so either by a judgment or an opinion. That power is by statute vested in the Supreme Court. N. Y. Civ. Prac. Act §473; *Bank of Yorktown* v. *Boland*, 172 Misc. 885, 887 (1940), aff'd 259 App. Div. 987, aff'd 284 N. Y. 749 (1940).

Nor can the New York Court of Appeals find facts for itself as to matters upon which no finding was made either by the trial court or by the Appellate Division. N. Y. Constitution, Art. VI, §7 (Appendix F hereto, *infra*, p. X23); 9 Carmody-Wait Cyc. N. Y. Practice, §226, p. 427. The only power it possesses is to "choose between the findings of the Special Term and the new findings of the Appellate Division," if such have been made. *Matter of City of N. Y.*, 1 N. Y. 2d 428, 430 (1956); *People ex rel. MacCracken* v. *Miller*, 291 N. Y. 55, 61 (1943); *Harrington* v. *Harrington*, 290 N. Y. 126, 130, 131 (1943).

The Court of Appeals did not, and could not, make any new declarations, findings or adjudications.

To the extent, then, that the Courts below have found the basis for their decision in matters of fact "necessarily determined by the Court of Appeals", they have attempted to circumvent New York law by holding that the facts required to justify their decisions were "necessarily determined" by the Court of Appeals, even though such facts expressly had not been found by the Appellate Division

and could not, under applicable New York law, have been found by the Court of Appeals.

Under New York law, the assertion of the defense of collateral estoppel requires the courts to ascertain what was "litigated" and "decided" in the former action pleaded in bar. *City Bank Farmers Trust* v. *Macfadden*, 13 A. D. 2d 395, 400-401 (1st Dept. 1961); *Rudd* v. *Cornell*, 171 N. Y. 114."

The Courts below *conclusively* presumed that every *statement* in the *opinion* of the Court of Appeals constituted "findings of fact and conclusions of law" and "binding adjudications" (R. pp. 5831-4; 1411-14). Worse, where the Courts below could find no statements in that *opinion* to support their holdings, they resorted to what they thought the Court of Appeals must have "contemplated" (24a, 25a). The true test of *res judicata* or collateral estoppel is not what a court may, or may not have, "contemplated", or even statements made in its "opinion". The actual and ultimate adjudication and determination in *Cadman* must be found in the judgments and in all of the proceedings leading thereto, keeping in mind it was an action for a declaratory judgment.

The sole "adjudication" of the Court of Appeals in *Cadman* was found in its order and judgment (166b-168b, 171b-172b; Appendix D, E, hereto, *infra*, pp. X17-X21), which merely adjudged "that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs". The only "adjudications" in said judgment of the Appellate Division entered June 3, 1952 were that the complaint and the counterclaim be dismissed, with costs (145b-147b; Appendix C hereto, *infra*, pp. X14-X16).

Not one of these orders and judgments contained any declarations, findings or determinations or any "adjudi-

cations", except as noted. None of them provided for a dismissal of the complaint "on the merits".

It is perfectly apparent from the majority and minority opinions of the Appellate Division and of the Court of Appeals that the dismissal in *Cadman* was for lack of power and jurisdiction to grant a declaratory judgment in absence of necessary, affected parties (138b-139b; 279 App. Div. 1074, 1076; 159b; 162b-163b; 306 N. Y. 151, 169). That is the rule of law for which the *Cadman* case has since been cited (See *Terner* and *Siegel* cases, *supra*).

For example, the Appellate Division said in its opinion (138b):

> "In any event there should have been no declaration of the rights of plaintiffs with respect to the funds and assets held by the corporate societies and agencies. If any declaration is to be made with respect to plaintiffs' rights in or to such funds, or if it is to be determined that such funds are subject to a trust which may be enforced at the instance of plaintiffs, such determination should be made only in an appropriate action or proceeding in which such corporate societies and agencies may be before the court as parties."

The majority opinion in the Court of Appeals was to the same effect (159b).

The minority opinion in the Appellate Division stated (139b):

> "I cannot agree that the trial court had no jurisdiction to determine this matter. • • • Thus, I believe the court's jurisdiction is clearly established and a definite question is laid before us for determination."

The minority opinion in the Court of Appeals stated (162b):

"We are all in accord that there is no ecclesiastical question in this case. • • •

"We also agree that there should have been no declaration either by Special Term or the Appellate Division as to the rights of plaintiffs with respect to the funds and assets held by the various corporate societies and agencies until the latter were brought before the court as parties. As to such funds, which we are told amount to upwards of $60,000,000, plaintiffs may well have rights in the way of continued service and otherwise, by reason of their contribution of many tens of thousands of dollars over the years. Whatever these rights—which may only be determined when the necessary parties are before the court—they may not be stripped from plaintiffs simply because they choose to remain independent Congregational Churches. Good faith and Christian understanding on both sides should solve such problems as they actually arise; should such understanding not come to pass, plaintiffs may then urge whatever rights they claim to have, and which they assert are impinged upon, in an appropriate action with all necessary parties before the court. Because we cannot pass upon them at this time is not to say that they have no rights."

It is manifest that in this last quotation "We also agree", refers to *all* of the members of the Court of Appeals.

On this point the Appellate Division and the Court of Appeals cited N. Y. Civ. Prac. Act. §§193, 473; and *Manhattan Storage & Warehouse Co.* v. *Movers Assn.*, 289 N. Y. 82, 88 (1942) and *Wood* v. *City of Salamanca*, 289 N. Y. 279, 282 (1942).

These citations are revealing. C.P.A. Section 473 provides for declaratory judgments. C.P.A. Section 193 relates to indispensable parties, defining them as persons

"whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the Court." *Manhattan Storage* and *Wood* are leading New York cases for the rule that a court must refuse a declaratory judgment in absence of persons who would be affected by such judgment.

In so far as any other issues of the case were discussed in its opinion, such discussion was simply *dicta* and not binding on anyone. It was not enforceable against anyone. It did not constitute declarations, adjudications or determinations which had "the force of a final judgment" (N. Y. Civ. Prac. Act §§472, 473).

It is clear that, under New York law, *res judicata* is a doctrine of estoppel by "judgment" and not estoppel by "opinion". Even findings of fact contained in a decision or opinion do not have the force and effect of the thing adjudged unless the subject matter is "definitely disposed of by the judgment". *Walfrice* v. *Buffalo Pottery Co.*, 176 Misc. 472, 474; 27 N. Y. S. 2nd 487; aff'd, 263 App. Div. 787 (4th Dept., 1942) *Silberstein* v. *Silberstein*, 218 N. Y. 525 (1916); *People* v. *McCanliss*, 255 N. Y. 456, 459 (1931).

Moreover, in New York, a declaratory judgment has a particular form, containing express declarations of the rights of the parties as well as findings of fact. *Salzman* v. *Sakofsky*, 195 Misc. 166 (1949).

It is the "judgment" which constitutes the "*determination*" of the rights of the parties in an action, especially in a declaratory judgment action. The "determination" is not the "opinion"; it is the *judgment* (N. Y. Civ. Prac. Act §§472, 473).

The precise difficulty with what the defendants have asserted and the Courts below have decided herein

as to what *Cadman* "adjudicated", is that these assertions and their decisions rest *entirely* on the statements in that opinion not "essential to dispose of the case", and cannot, under the law of New York or the decisions of this Court, support a defense of *res judicata*. *City Bank Farmers Trust* v. *Macfadden, supra; Murray* v. *Pocatello, supra; Stokes* v. *Stokes*, 155 N. Y. 581, 592 (1898); *Ripley* v. *Storer*, 309 N. Y. 506, 512 (1956).

The Court of Appeals held, as a matter of law, that "no legal issue not determined by *Cadman* is raised by the present complaint" (Appendix B, hereto *infra*, p. X11; 305 F. 2d 724, 728) and that defendants here, though not bound or burdened by *Cadman*, can claim its benefits. In so holding, the Courts below necessarily are saying that the events which have occurred, and the actions which have been taken by the defendants, since *Cadman* are not material and raise no new issues. Such a holding is in conflict with the law of New York (*Mullane* v. *McKenzie*, 269 N. Y. 369, 373 (1936)) and decisions of this Court (*Third National Bank of Louisville* v. *Stone*, 174 U. S. 432, 434, (1899)) holding that a prior judgment cannot bar a subsequent action involving new facts creating new legal relations and altered rights. The law of New York is that "where the issue in the second action differs *in any way* from that in the earlier action, the plea (i.e., *res judicata*) of course, is not available". *Good Health Dairy Prod. Corp.* v. *Emery*, 275 N. Y. 14, 17-8 (1937); *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 119 (1956). It is apparent from plaintiffs' Statement of Issues (248a-273a), and plaintiffs' Statement of Facts (293a-317a) that many new material facts have occurred since *Cadman* and the issues herein are not identical with those in *Cadman*.

The law of New York is, as Judge Cardozo stated it in *Schuylkill Fuel Corp.* v. *Nieberg*, 250 N. Y. 304, 307 (1929)

that where the issues in two actions are not identical, even though the parties are the same, "the estoppel is limited in such circumstances to the point actually determined", (citing *Cromwell* v. *County of Sac*, 94 U. S. 351) and the test of what was "actually determined" is stated at p. 308:

> "The decisive test is this, whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second."

If, as defendants maintain, and the Courts below have held, they are not bound by the decision in *Cadman*, there were no rights or interests of the defendants established by the *Cadman* judgment which could be destroyed or impaired; Cf. *Davies* v. *Stumpf*, 262 App. Div. 499, 31 N. Y. S. 2d 1000 (1st Dept. 1941) and *Gart* v. *Cole*, 166 F. Supp. 129, aff'd. 263 F. 2d 244 (2nd Cir. 1959).

For example, the *Cadman* judgment (146b; Appendix C hereto p. X15) stated that the Court had "made no determination" and had "not considered" questions of doctrine, polity and other ecclesiastical matters. There are very important issues herein involving those questions. Plaintiffs also, here raise issues regarding changes made since 1957, in various charters, constitutions and by-laws which change the control of defendant congregational boards and agencies, their functions and funds. Also, issues have been raised with regard to actions taken since the formation of the "United Church of Christ" in 1957 involving the status of the plaintiff ministers and their pension contracts and affecting the status of mortgages held by defendant Congregation Church Building Society on Congregational Christian Churches (1C-13C).

These are but three examples of issues raised here which are different, under the New York test, from the

issues raised in *Cadman*. Their determination here would not destroy or impair the rights or interests, if any, of the defendants established by the *Cadman* judgment.

In sum, the decisions below have disregarded and are in conflict with basic applicable principles of New York law, and by this clearly erroneous and destructive judicial process plaintiffs have been deprived of due process of law under the Fifth and Fourteenth Amendments of the Federal Constitution.

(3) The Courts Below Have Deprived Plaintiffs of Due Process of Law in Violation of the Fifth or Fourteenth Amendments In Holding, Contrary to Decisions of This Court and the Law of New York, That They Are Bound By "Adjudications" In *Cadman* v. *Kenyon*, To Which They Were Not a Party and in Which They Were Not and Could Not Have Been Represented.

Whether or not plaintiffs in this action are bound by the adjudications in *Cadman* (whatever those "adjudications" are held to be) is to be determined by New York law. *Angel* v. *Bullington*, 330 U. S. 183 (1947).

But, in holding plaintiffs so bound under the law of New York the Courts below have deprived them of due process of law either in violation of the Fourteenth Amendment or the Fifth Amendment, or both, whether or not their view of New York law was correct or wrong. *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464 (1917).

The doctrine of collateral estoppel cannot be applied against a party unless he has directly or representatively litigated in an earlier action the same matter to be foreclosed.

> "The opportunity to be heard is an essential requisite of due process of law in judicial proceed-

> ings. * * * And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, * * * so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein." *Postal Telegraph Cable Co.* v. *Newport, supra,* at p. 476.

Plaintiffs have been deprived of due process of law by the Courts below because they have been denied a first determination of their rights, status and legal relations herein on the erroneous ground it would be *their* second. This foreclosure by the Courts below is predicated expressly on the ground that ten years earlier a single Congregational church brought a "class action" which resulted, under New York law, in an "adjudication" of the rights and legal relations of the plaintiffs herein, as ministers, members of churches, members of defendant boards, which is binding on them *now* despite the fact that they were not named as parties to that action, had no notice that it was brought in their behalf because it did not purport to be so brought, and have interests not common to the plaintiff in that action or each other. This foreclosure was, under the circumstances, a deprivation of due process under the decisions of this Court. *Hansberry* v. *Lee,* 311 U. S. 32; *Postal Telegraph Cable Co.* v. *City of Newport, supra.*

Plaintiffs sue both individually and on behalf of others similarly situated. None of these plaintiffs was a party to, or represented in, the *Cadman* case. District Judge Dawson so held, in denying defendants' motions for summary judgment, irrespective of whether the *Cadman* action was considered a true class action, hybrid class action or spurious class action (50a).

There are, at least, two dispositive reasons why plaintiffs here are not bound by the "adjudications" in *Cadman*, whatever those may be viewed to be.

First, the *Cadman* action was not a "class action" of such a nature as to bind parties not named as such. The fact that the *Cadman* Church entitled its suit as one brought on behalf of itself and churches "similarly situated" does not make it such a class action. *Hansberry* v. *Lee*, *supra*.

Second, and more obvious, there was no representation in *Cadman* of the interests of plaintiffs here adequate to support a constitutional application of the doctrine of collateral estoppel. *Hansberry* v. *Lee*, *supra*; See 132 A.L.R. at p. 750; 3 Moore's *Federal Practice*, Par. 23.04.

The Court below held plaintiffs here to have been represented in *Cadman* by the following test:

> "The question whether in a particular suit the interests of an entire class are common and the representative shares then will depend on the specific issues raised and decided in that litigation. See *Brenner* v. *Title Guarantee & Trust Co.*, *supra*, 276 N. Y. 230, 11 N. E. 2d 890, 114 A. L. R. 1010. Thus to decide whether plaintiffs were or could be represented in the *Cadman* litigation, we must also determine what the New York courts decided there."

This test is fallacious and *Brenner* v. *Title Guarantee & Trust Co.* does not support such a test, either standing alone or as construed by this Court in *Hansberry* v. *Lee*, *supra*, at p. 45.

It is not necessary "to determine what was decided in *Cadman*" to decide whether the plaintiffs here were represented there.

But the test of binding representation is not whether the complaint in *Cadman* and in this suit allege the same

source of legal wrong, but whether the interests wronged are the same. *Hansberry* v. *Lee*, *supra*.

It seems too obvious for argument that the single church and sole plaintiff in *Cadman* could not represent therein, as "*common*" to all, the varying interests of all of the Congregational Christian Churches, the ministers of churches, the members of churches, and the members of defendant Congregational boards that are plaintiffs herein, and the separate classes which each represents; that members of corporate societies cannot be represented by a church which is not a member of that society; that ministers may not be represented, individually, by a church; that individual members of a church cannot be represented by a church of which they were not a member and none of whose members was a party; and that churches with mortgages may not be represented by churches without mortgages.

Each of plaintiff classes has distinct interests, peculiar to them, which are not "united with" or "common" to either the interests of the other classes of plaintiffs or to the interests of the Cadman Church in the *Cadman* action. "Community of interest"—whatever that phrase may mean—is not the equivalent of being "united in interest" or having a "common interest" and that is what is required by *Brenner* v. *Title Guarantee & Trust Co.*, 276 N. Y. 239 (1937).

Plaintiffs set forth in their complaints (72a, 165a, 170a) as well as in their statement of interests (276a-284a, 285a-292a, 243a-244a) the interests claimed by each of them individually and as a class (1) in the funds of the defendants and (2) other than interests in funds. These clearly showed that here the plaintiffs, as classes each having members too numerous join as party plaintiffs, bring this suit for declaratory judgment as to each of their separate

and distinct complexes of rights, status and other legal relationships in respect of the defendants herein and their funds.

The law of New York does not permit finding the plaintiffs in this suit and the classes they represent to have been adequately represented in *Cadman* by the single, separately wronged, church there plaintiff *Bouton* v. *Van Buren*, 229 N. Y. 17, 22 (1920); *Brenner* v. *Title Guar. & Trust Co.*, 276 N. Y. 230, 236 (1937); *Society Milion Athena* v. *National Bank of Greece*, 281 N. Y. 282, 292-293 (1939); *Kovarsky* v. *Brooklyn Union Gas Co.*, 279 N. Y. 304, 314 (1938).

These considerations of "representation" are *not* technicalities. They are safeguards against an unconstitutional application of the doctrine of collateral estoppel of which this Court warned in *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 58-59 (1908).

The Courts below by their erroneous interpretation and application of *Hansberry* v. *Lee* and *Brenner* v. *Title Guarantee & Trust Co.* have deprived these plaintiffs of due process of law under the Fifth or Fourteenth Amendments, or both.

(4) The Court of Appeals Has Sanctioned a Course of Conduct By the District Court Which Deprived Petitioners of Procedural Due Process of Law and So Far Departed From the Accepted Course of Judicial Proceedings As to Call For the Exercise of the Supervisory Powers of This Court.

Shortly after the action started, in 1957, defendants moved for summary judgment dismissing the complaint on grounds of *res judicata* and collateral estoppel based on the decision in *Cadman* (343a-414a). The District Court (Dawson, J.) denied those motions, rendering a full

and careful opinion (35a-62a). Judge Dawson had before him the complete record of proceedings and all of the briefs filed in *Cadman*. He held *Cadman* was not a bar, and there should be a "trial of the action" (61a)—not merely a trial of those defenses.

Thereafter, District Judge Dimock, to whom the case was assigned for trial, disregarded and overruled Judge Dawson's decision (14a). This did not "preserve the orderly functioning of the judicial process". *TCF Film Corporation* v. *Gourley*, 240 F. 2d 711, 714 (3rd Cir., 1957). He promptly granted defendants' motions for a separate preliminary trial—a move designed to short-circuit a trial on the merits—and did so over plaintiffs' objections that the issues thereon would be so closely entwined with the merits that prejudice and no benefit would result from such a procedure.

This separate trial turned out to be a travesty on justice. It was not really a "trial" at all—it consisted almost entirely of prolonged argument by the attorneys, and a reargument of the summary judgment motion. Not a witness was sworn. There was no opportunity to examine or cross-examine witnesses.

Extensive pre-trial proceedings were held during which, over plaintiffs' opposition, the Court framed and issued three pre-trial orders and required plaintiffs to file various "statements" pursuant thereto.

In the pre-trial proceedings the District Judge disregarded the pleadings, in favor of such "statements", stating:

> "Pleadings have become largely formalities in this court, and I think we can proceed even though the issue is perhaps not joined in the common law sense * * * the fact that it is in the complaint does not make any difference" (R. 4473).

The Court abruptly terminated the pre-trial hearings before completion and ordered the trial to commence twelve days thereafter; and in doing so, he denied plaintiffs' request for a written pre-trial order delineating with some certainty the many rulings made thereon including numerous rulings on "admissible" lines and items of evidence.

On the separate trial, after plaintiffs had offered, and rested on, the record and briefs in *Cadman*, plaintiffs moved to dismiss the defenses for failure of proof. After six days of argument, the Court permitted defendants to re-open and to put in additional evidence consisting of Exhibits G through N—which the Court had previously ruled would be admissible by plaintiffs as material new facts occurring since *Cadman*. Upon plaintiffs' renewal of their motion to dismiss and their refraining from offering their proofs until that motion was decided, the District Court, on its own, marked into the record numerous documents as "Court Exhibits" (Court Exhibits 4 through 56; R. p. 1913). It is not a proper function of a judge to adduce evidence. (Wigmore on Evidence, 3. Ed., Vol. IX, §2483, p. 266.)

During the extended argument of plaintiffs' renewed motion, the District Court disregarded plaintiffs' contention that expert testimony and evidence would be necessary for the Court to properly evaluate the ecclesiastical documents and issues before it. It, also, assured counsel that if the motion to dismiss was denied, plaintiffs would have an opportunity to introduce their evidence on the *res judicata* issue, stating:

> "I don't see how you can lose. You made a motion to dismiss this defense. Insofar as you fail to dismiss the defense, you still have an opportunity to go in with your evidence. It doesn't end the case" (R. 988).

But, when the District Court denied the motion, it "did end the case". The "formal resumption of the trial" referred to in its opinion (34a) was precisely that—a mere formality. At the outset, Judge Dimock made it clear that his decision was intended to be final and complete on the issue of *res judicata* and no proofs plaintiffs could offer would affect the result. The Court refused to allow plaintiffs' first witness to be sworn; and then ruled that none of plaintiffs' witnesses could testify and none of plaintiffs' documentary evidence would be received. Even plaintiffs' request to make a separate record of their evidence offered (Rule 43 c, FRCP) was denied. The District Court thereupon dismissed plaintiffs' action, adopting as its final opinion, without amendment, the opinion denying plaintiffs' said motion. Thus terminated plaintiffs' "appropriate action" (suggested by the courts in *Cadman*) after four years, without a trial on the merits or even an opportunity to present their evidence on the separate trial.

These proceedings were not due process of law.

By its acts the trial court departed drastically from recognized trial procedure, and due process. The trial afforded must be a real one and not a mere pretense. A trial includes, at least, the right to introduce evidence. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 164 (1950); *B. & O. R. Co.* v. *U. S.*, 298 U. S. 349, 368-9 (1935).

Plaintiffs and those similarly situated are simply seeking a declaration of their rights, status and legal relations in light of the existing "union" and "schism". The New York Court of Appeals clearly indicated that such rights and relations could not be "stripped" from them simply because they chose to continue as Congregational Christian churches, members and ministers (163b). This would be "catastrophic", as Judge Steinbrink said in *Cadman* (91b-92b).

This case is difficult and unusual. The legal and factual issues are complicated. But the parties, under constitutional due process, are entitled to at least one declaration and determination of their civil and property rights; and not be shuttled out of a state court, for a claimed lack of jurisdiction due to absence of necessary parties, and then, out of the federal court, on the ground that the state court "determined" all of the issues as to all of the parties, plaintiffs and defendants.

(5) The Issues and the Legal Questions Involved in This Case Are of Great and Far-reaching Importance.

The issues involved herein are of vital importance to large numbers of people and churches throughout the nation. Here, too, are important questions in the administration of justice. In order to settle the important issues and questions presented, and in the interests of justice, this Court, it is respectfully submitted, should review the proceedings below.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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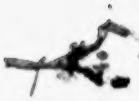

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of August one thousand nine hundred and sixty-two.

Present—Hon. CHARLES E. CLARK,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN, *Circuit Judges.*

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, *et al.*, suing on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

EVANGELICAL AND REFORMED CHURCH, *et al.*,

Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

A true copy,
A. DANIEL FUSARO
Clerk

United States Court of Appeals
Second Circuit
Filed August 1, 1962
A. DANIEL FUSARO, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 320—September Term, 1961.

(Argued May 10, 1962 Decided August 1, 1962.)

Docket No. 27258

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, *et al.*,

Plaintiffs-Appellants,

EVANGELICAL AND REFORMED CHURCH *et al.*,

Defendants-Appellees.

Before: CLARK, SMITH, and KAUFMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge.*

Plaintiffs appeal from the dismissal on the ground of *res judicata* of their representative action for declaratory and other relief based on the claimed invalidity of an agreement of union between the Congregational Christian Churches and the Evangelical and Reformed Church. See D. C. S. D. N. Y., 198 F. Supp. 677. Affirmed.

See also D. C. S. D. N. Y., 160 F. Supp. 651; 21 F. R. D. 325.

Appendix B

CLARK, *Circuit Judge:*

Plaintiffs-appellants appeal from a decision of the district court dismissing their complaint on the grounds that all the matters stated therein had been previously adjudicated against all the plaintiffs and all classes of parties represented by them in a final adjudication by the New York Court of Appeals in *Cadman Memorial Congregational Soc. of Brooklyn* v. *Keegan*, 306 N. Y. 151, 116 N. E. 2d 481. Plaintiffs had sought declaratory and other relief below, based upon the asserted invalidity of a far-reaching agreement of church union. Judge Dawson ordered the case to trial in denying summary judgment, D. C. S. D. N. Y., 160 F. Supp. 651;[1] thereafter Judge Dimock ordered a separate trial of the issue of *res judicata* and collateral estoppel; upon such trial he found for the defendants, see D. C. S. D. N. Y., 198 F. Supp. 677, and eventually entered the judgment appealed from. We here affirm that judgment.

This litigation has been protracted and acrimonious. It arose from the historic decision made by the defendant General Council of the Congregational Christian Churches of the United States to enter into a union with the defendant Evangelical and Reformed Church to form the United Church of Christ. After lengthy study and negotiation a group representing the Evangelical and Reformed Church and a commission appointed by the General Council met and adopted a document called the Basis of Union, which set forth the procedures to govern the proposed merger. In 1949, concluding that the merger had the approval of a

[1] In *First Cong. Church and Society of Burlington, Iowa* v. *Evangelical and Reformed Church*, D. C. S. D. N. Y., 21 F. R. D. 325, Judge Dawson denied the application of yet other interests to intervene as parties plaintiff.

sufficient percentage of the adherents of the Congregational Christian faith, the General Council voted to consummate the Union; and a similar decision was made by the Evangelical and Reformed Church.

The General Council's determination to consummate the merger is strenuously opposed by many of the Congregational Christian Churches. The nonassenting group believes that the proposed United Church of Christ represents a drastic change from the traditional polity of the Congregational Christian Churches. Since their origin in this country in 1620 these have been independent, self-governing fellowships without any central ecclesiastical control. These independent fellowships have, however, established certain regional associations and a national council, the defendant General Council of the Congregational Christian Churches of the United States. Also established on a national scale were the various boards, agencies, and corporations which are defendants to this action. Typical of these are the American Board of Commissioners for Foreign Missions, denominated "the agency of the Congregational Christian Churches for the extension of Christ's kingdom abroad," and The Annuity Fund for Congregational Ministers, a corporation whose purposes are obvious. These organizations administer substantial financial assets. And of course each Congregational Christian Church owns church property the sum total of which runs into hundreds of millions of dollars.

The nonassenting churches believe that the merger would destroy or substantially alter the nature of Congregationalism. The United Church of Christ, it is contended, will be organized on presbyterian lines, as an authoritative church governed by ecclesiastical bodies with sovereignty over the

constituent churches, members, and ministers. The nonassenters maintain that the General Council, which they believe to be an agency possessing only very limited delegated powers, lacked any authority to commit the Congregational Christian Church to any merger with another church. Thus they contend that the Basis of Union is wholly unauthorized. The nonassenters also assert that this unauthorized act by the Council commits all members of the Congregational Christian denomination to membership in the United Church of Christ, and it is claimed that if the nonassenters choose to remain outside that body they will be deprived of their rights in the assets held by the General Council, the funds, and agencies.

To halt this development, one of the nonassenting groups, the Cadman Memorial Society of Brooklyn and the Cadman Memorial Church, brought suit in 1949 against Helen Kenyon, the Moderator of the General Council. This suit, which was filed in the Supreme Court of New York State, was brought "on behalf of themselves and other Congregational Churches similarly situated." The Cadman Church and Society requested a declaratory judgment that the General Council had no power to consummate the Basis of Union or to unite with the Evangelical and Reformed Church; that no acts taken by the General Council can or will affect individual Congregational Christian Churches without their voluntary assent; that those churches which do join the new church will thereby lose all rights in and control of the various corporations, boards, and instrumentalities which had been established for the furtherance of Congregationalism. Cadman also prayed for an injunction halting the merger of the churches and the consolidation of the corporations, boards, and agencies with their counterparts in the Evangelical and Reformed Church.

Appendix B

The state supreme court granted Cadman's pleas, declaring that the General Council was powerless to consummate the Basis of Union and enjoining any further actions in that direction. The court specifically enjoined the Council from uniting or transferring the corporations, agencies, and instrumentalities of the Congregational Christian Churches, or their funds and properties, with or to any agency of the Evangelical and Reformed Church or the United Church of Christ. *Cadman Memorial Congregational Soc. of Brooklyn* v. *Kenyon*, 197 Misc. 124, 95 N. Y. S. 2d 133 (1950). On appeal, the Appellate Division reversed the judgment of the supreme court on the law and the facts, and ordered the plaintiffs' complaint dismissed. 279 App. Div. 1015, 1074, 111 N. Y. S. 2d 808 (1952). This judgment was affirmed in a full opinion by the New York Court of Appeals, two judges dissenting. 306 N. Y. 151, 116 N. E. 2d 481 (1953).

Subsequently on June 20, 1957, this action was commenced in the United States District Court for the Southern District of New York. The plaintiffs are other nonassenting churches, ministers, members of churches, and members of the various boards and agencies of the Congregational Christian Church. Defendants are the Evangelical and Reformed Church, the Treasurer of the General Council, the several boards, agencies, and corporations, and the co-President of the United Church of Christ. Because determination of the precise nature of the relief requested by plaintiffs is crucial to a resolution of the issues raised on this appeal, we find it necessary to set out at some length the gist of the voluminous and repetitive complaint.

The prayer for relief requests certain specific declarations to be made; these fall into several general classes. The first of these in essence ask for declarations that the Basis of Union is invalid, that the General Council lacked

power to enter into the Union, and that the General Council could not merge or consolidate the agencies, boards, and corporations of the Congregational Christian Churches with those of the Evangelical and Reformed Church. The second class are requests for declarations that the statements in the Basis of Union that the ministers and members of each communion shall be enrolled in the United Church of Christ, and that the individual churches shall become members of that Church, are invalid and void. A third class are requests for declarations of the invalidity of the provisions of the Basis of Union purporting to alter the status of the General Council, agencies, and corporations by merging these with any similar bodies of the Evangelical and Reformed Church. A fourth class ask for declarations that the General Council cannot by its own act bring any individual church into the United Church of Christ, make any individual a member of the United Church of Christ, or enroll any minister as a minister of the new church. The final class of requested declarations are that no minister shall be required to withdraw "from the fellowship of the Congregational Christian Churches"; that the churches, ministers, and members may not "be deprived of their rights in and to the assets, properties and organizations of the Congregational Christian agencies and instrumentalities * * * by reason of their remaining Congregational Christian Churches, ministers and members instead of becoming part of the 'United Church of Christ.'" Further declarations are asked to the effect that the agencies and instrumentalities may not unite with agencies of the Evangelical and Reformed Church, or with the United Church of Christ. Upon the separate trial ordered by Judge Dimock on defendants' affirmative defenses of *res judicata* and collateral estoppel

and after long hearings, Judge Dimock in an extensive reasoned opinion granted defendants' motion to dismiss this complaint and thereafter entered the judgment of dismissal here under appeal.

The issues raised by the appeal can be stated very simply: What was decided by the New York courts in the *Cadman* litigation? and who is bound by that determination under principles of *res judicata*? Plaintiffs maintain that the *Cadman* judgment cannot affect them, because they were not parties in that action and were neither in privity with nor represented by either of the two plaintiffs. They also maintain that the defendants in the present suit are not the same as those in *Cadman* and thus cannot plead that judgment in bar. Finally, plaintiffs contend that the dismissal of the *Cadman* complaint was solely for failure to join indispensable parties—a flaw they claim to have corrected. Since jurisdiction in this suit is grounded on diversity of citizenship, we look of course to the law of New York to determine these issues.

The first question is whether plaintiffs, who were not named parties in the *Cadman* suit, may under applicable principles of *res judicata* be bound by the New York decision. New York, as most jurisdictions, permits representative actions to be brought by one or more members of a class of persons having common interests on behalf of the entire class. If the representation is adequate the determination in such a representative suit is binding on all members of the class. *Brunch* v. *Title Guarantee & Trust Co.*, 276 N. Y. 230, 11 N. E. 2d 899, 114 A. L. R. 1010. Defendants maintain, and the trial court found, that the *Cadman* action was such a representative suit and that the present plaintiffs, having common interests with the Cadman

Church and Society, and adequately represented by them, are bound by the judgment rendered by the New York Court of Appeals. Plaintiffs, on the other hand, point to a variety of differences between their situation and that of the two *Cadman* plaintiffs which they say take them out of the class properly represented in that action. Among the more crucial of these differences are that, unlike the Cadman Church and Society, some of the churches that bring this action have property which is subject to mortgages held by defendant The Congregational Church Building Society, and that here are joined ministers and individual church members, while there were no such parties represented in *Cadman*.

To bind members of a class not named as parties to a suit, a representative action must fulfill certain prerequisites. All members of the class must be necessary—indispensable—parties to the suit; that is, their interests in its outcome must be joint or common so that the rights of all are necessarily affected by any action brought by one or more. *Brenner* v. *Title Guarantee & Trust Co.*, *supra*, 276 N. Y. 230, 11 N. E. 2d 890, 114 A. L. R. 1040. Where such a community of interests exists, a class suit will nevertheless not bind absent members of the class if the named parties or representatives actually have interests in the outcome of litigation adverse or not necessarily similar to those of all members of the class. *Hansberry* v. *Lee*, 311 U. S. 32, 132 A. L. R. 741. The question whether in a particular suit the interests of an entire class are common and the representative shares then will depend on the specific issues raised and decided in that litigation. See *Brenner* v. *Title Guarantee & Trust Co.*, *supra*, 276 N. Y. 230, 11 N. E. 2d 890, 114 A. L. R. 1040. Thus to decide whether

plaintiffs were or could be represented in the *Cadman* litigation, we must also determine what the New York courts decided there.

It is our conclusion that as to the issues actually raised and resolved by the New York Court of Appeals in *Cadman*, the plaintiffs therein and the present plaintiffs form one class having common interests, and all were adequately represented by the Cadman Church and Society. Since no legal issue not determined by *Cadman* is raised by the present complaint, the judgment of the district court dismissing plaintiffs' complaint must be affirmed.

(1) Both the *Cadman* plaintiffs and the plaintiffs here requested declarations that the General Council is powerless to effectuate the Union and thus the Basis of Union is invalid. Both also asked for declarations that the General Council cannot by its own act unite the individual Congregational Christian Churches with the United Church of Christ. In *Cadman*, the New York Court of Appeals faced this issue and indicated that, at least as far as the civil courts could examine the question, the acts of the General Council were wholly proper. That court stated that "there is no power and none is claimed by which the General Council can compel or intends to compel the plaintiff Cadman or any other nonassenting church to join the Union unwillingly or impose upon them a change of faith or doctrine," and affirmed the validity of the Basis of Union. *Cadm. Memorial Congregational Soc. at Brooklyn v. Kennon*, *supra*, 306 N. Y. 151, 163, 115 N. E. 2d 481, 485. (It should be noted that even the dissenters in the New York Court of Appeals agreed that the General Council was authorized to enter into the merger and implement

the Basis of Union.) The questions of the validity of the General Council's action and its effect on individual congregations were legal issues in which all the present plaintiffs have the same interest as the *Cadman* plaintiffs and to which the differences in their various situations are irrelevant; and thus as to these questions the decree is binding on all.[2]

(2) Both in *Cadman* and in this case plaintiffs requested rulings that the merger of the boards, agencies, and corporations of the Congregational Christian Church was unlawful. The New York Court of Appeals pointed out that all the funds which were contributed to these charitable entities were given in the form of voluntary donations to be used by the corporations for their general purposes. It ruled that in such a case the civil courts can only scrutinize the expenditure of funds to determine if the use is not violative of charter purposes. Finding neither any direct interest of the plaintiffs in the funds nor any charter violations, it concluded that the complaint should be dismissed. Since the plaintiffs here, as the district court found, also all have made only voluntary contributions, if any, and no further charter violations are shown, the present plaintiffs were clearly members of the class represented by the Cadman Church and Society for purposes of resolving the status of the boards and agencies, and are bound by that decision.

(3) There remains the request made by the present plaintiffs for a declaration that ministers, members, and

[2] While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil courts, it would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted.

nonassenting churches may not be deprived of their rights in the assets, properties, and organizations of the Congregational Christian agencies and instrumentalities. If they could show some right or interest adverse or dissimilar to that of the *Cadman* plaintiffs in these assets, etc., the present plaintiffs might prevail in their claim that the Cadman Church and Society could not adequately represent them in the litigation of such an issue. They have, however, made no such showing. While they point to certain differences of interest, no showing is made that these differences give plaintiffs here a claim or right to a declaratory judgment different from that asserted by *Cadman*. And while such a separate claim or right might arise if, for example, a mortgage were foreclosed or a pension denied because of refusal to join the United Church of Christ, we cannot on the present record ascertain any imminently threatened interest which the present plaintiffs possess which so differentiates them from the *Cadman* plaintiffs, in terms of the issues there decided, that the *Cadman* plaintiffs could not adequately represent *all* the varying nonassenters.

The final point raised is whether those defendants in this case who were not parties in *Cadman* may plead that decree as *res judicata*. Since all the defendants herein have the same interests as the General Council, which defended the *Cadman* litigation, they under the law of New York may claim the benefit of that decision, even if they may not be made to bear its burdens. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97, 151 N. Y. S. 2d 1; *Gart* v. *Cole*, 2 Cir., 263 F. 2d 244, certiorari denied 359 U. S. 978.

Affirmed.

APPENDIX C

Judgment Entered Upon Reversal by Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK,

KINGS COUNTY.

CADMAN MEMORIAL CONGREGATIONAL SOCIETY OF BROOKLYN and THE CADMAN MEMORIAL CHURCH, suing on behalf of themselves and other Congregational Christian Churches similarly situated,

Plaintiffs-Respondents,

against

HELEN KENYON, as Moderator of the General Council of the Congregational Christian Churches of the United States,

Defendant-Appellant.

The defendant-appellant having appealed to the Appellate Division of the Supreme Court of the State of New York, Second Department, from a judgment of the Supreme Court, Kings County, in favor of the plaintiffs-respondents and against the defendant-appellant, entered in the Office of the Clerk of the County of Kings on the 21st day of February, 1950, and said Appellate Division having by on order, as amended upon motion of the Court and entered on May 5th, 1952, in the Office of the Clerk of the said Appellate Division (a certified copy of which amended order was duly entered and filed together with the remittitur in the Office of the Clerk of the Supreme Court

of the State of New York, County of Kings, on the 7th day of May, 1952, ordered that the judgment so appealed from be reversed on the law and the facts, with costs, and plaintiffs' complaint and defendant's counterclaim dismissed, with costs to the defendant; and by said amended order having ordered that findings of fact expressed and implied, inconsistent with its opinion and decision slips be reversed, except such findings as were made expressly or by implication, upon questions of doctrine, polity and other ecclesiastical matters, which matters were not considered by said Appellate Division and as to which it has made no determination; and the costs of the defendant-appellant having been duly taxed at the sum of $6,058.00; it is

ADJUDGED that the judgment so appealed from, be and the same is hereby reversed on the law and the facts, and plaintiffs' complaint and defendant's counterclaim dismissed; and it is

FURTHER ADJUDGED that the plaintiffs' complaint be and the same hereby is dismissed; and it is

FURTHER ADJUDGED that the defendant's counterclaim be and the same hereby is dismissed; and it is

FURTHER ADJUDGED that the defendant-appellant, Helen Kenyon, as Moderator of The General Council of the Congregational Christian Churches of the United States, of 287 Fourth Avenue, Borough of Manhattan, City and State of New York, do recover of the plaintiffs-respondents, Cadman Memorial Congregational Society of Brooklyn and The Cadman Memorial Church, of 350 Clinton Avenue, in the Borough of Brooklyn, City and State of New York,

suing on behalf of themselves and other Congregational Christian Churches similarly situated, the sum of $6,058.00 costs, and that said defendant-appellant have execution therefor.

Judgment signed and entered this 3rd day of June, 1952.

FRANCIS J. SINNOTT,
Clerk.

Filed & Rec.
Time 12:50 P. M.
June 3, 1952
Kings County Clerk's Office

APPENDIX D

COURT OF APPEALS.

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of December in the year of our Lord one thousand nine hundred and fifty-three, before the Judges of said Court.

Witness,

The Hon. Edmund H. Lewis,
Chief Judge, Presiding.
Raymond J. Cannon, Clerk.

Remittitur December 3, 1953

No. 338

CADMAN MEMORIAL CONGREGATIONAL SOCIETY OF BROOKLYN, & ano., &c.,

Appellants,

vs.

HELEN KENYON, as Moderator of the General Council of the Congregational Christian Churches of the United States.

Respondent.

BE IT REMEMBERED, That on the 3rd day of November in the year of our Lord one thousand nine hundred and

fifty-two, Cadman Memorial Congregational Society of Brooklyn, & ano., &c., the appellants in this cause, came here unto the Court of Appeals, by Davies, Hardy, Schenck & Sons, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Helen Kenyon, as Moderator of The General Council of the Congregational Christian Churches of the United States, the respondent in said cause, afterwards appeared in said Court of Appeals by Wood, Mollox, France & Tully, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Messrs. Kenneth W. Greenawalt and Joseph Diehl Fackenthal, of counsel for the appellants, and by Mr. Charles H. Tuttle, of counsel for the respondent, briefs filed by *amici curiae*, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of

the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals, Clerk's Office
Albany, December 3, 1953

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ RAYMOND J. CANNON
Clerk.

APPENDIX E

Judgment of Supreme Court, Kings County, Entered on Its Order of December 16, 1953

The above named plaintiffs having appealed to the Court of Appeals of the State of New York from the judgment entered in the office of the Clerk of the County of Kings on the 3rd day of June, 1952 upon the order of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of said Appellate Division on the 14th day of April, 1952, as amended by an order of said Appellate Division entered in the office of the Clerk of said Appellate Division on the 5th day of May, 1952, reversing the judgment in favor of the plaintiffs and against the defendant heretofore entered herein in the office of the Clerk of the County of Kings on the 21st day of February, 1950, which said judgment entered in the office of the Clerk of the County of Kings on the 3rd day of June, 1952, dismissed plaintiffs' complaint and defendant's counterclaim and further adjudged that the defendant recover from the plaintiffs the sum of Six Thousand and Fifty-Eight Dollars ($6,058.00) costs and that defendant have execution therefor; and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the judgment so appealed from be affirmed without costs in the Court of Appeals, and having further ordered and adjudged that the proceedings herein be remitted to this Supreme Court there to be proceeded upon according to law; and the remittitur from the Court of Appeals having been filed herein, and an order having been entered herein on the 16th day of

Appendix E

December, 1953 making the order and judgment of the Court of Appeals the order and judgment of this Court:

Now on motion of Wood, Molloy, France & Tully, attorneys for the defendant herein, it is hereby

ADJUDGED that the order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

ADJUDGED that the judgment entered herein on the 3rd day of June, 1952, be and the same hereby is affirmed.

Judgment signed and entered this 25th day of January, 1954.

FRANCIS J. SINNOTT
Clerk

Filed & Rec.
Time 2H20M
Jan 25 1954
Kings County, Clerks Office

APPENDIX F

U. S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Declaratory Judgment Act, 28 U. S. C. §2201:

Creation of remedy:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Appendix F

N. Y. Const. art. VI §7:

> The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved. * * *

N. Y. Civil Practice Act §193; Indispensable and conditionally necessary parties:

> 1. A person whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court is an indispensable party. A person who is not an indispensable party, but who ought to be a party if complete relief is to be accorded between those already parties is a conditionally necessary party.
>
> 2. When it appears that an indispensable party has not been joined, the court shall order such party brought in. If a party fails or neglects to bring in an indispensable party after a reasonable period granted to him to do so, the court shall dismiss the action without prejudice. When it appears that a conditionally necessary party has not been joined, the court shall order such party to be brought in if he is subject to the jurisdiction of the court and can be brought in without undue delay. The court in its discretion may proceed in the action without a conditionally necessary party if his addition would cause un-

due delay or if jurisdiction can be acquired over him only by his consent or voluntary appearance. If a party fails or neglects to bring in a conditionally necessary party, after a reasonable period granted to him to do so, the court may in its discretion dismiss the action without prejudice.

3. The provisions of this section shall be applicable to all actions whether formerly denominated legal or equitable.

N. Y. Civil Practice Act §473. Declaratory judgments:

The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section.

N. Y. Rules of Civil Practice, Rule 211:

Rule 211. Prayer for relief. The prayer for relief in the complaint shall specify the precise rights and other legal relations of which a declaration is requested and whether further or consequential relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated.

New York Civil Practice Act §472. Definition of Judgment:

A judgment is the determination of the rights of the parties in an action, and may be either interlocutory or final.

Office-Supreme Court, U.S.
FILED
JAN 28 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 705

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, FIRST CONGREGATIONAL CHURCH OF PONTIAC, MICHIGAN, FIRST CONGREGATIONAL CHURCH OF WAUWATOSA, WISCONSIN, MAYFAIR CONGREGATIONAL CHURCH OF TOLEDO, OHIO, MALCOLM K. BURTON, BRUCE H. MASSELINK, ANGUS MacDONALD, HARRY R. BUTMAN, GLADYS T. KENNEDY, NORMAN S. McKENDRICK, ROY W. ABEL, RICHARD H. PLOCK, JOHN G. PRYOR and FREDERICK GRABOW, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, JOHN T. BEACH, as Treasurer and a member of THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, THE BOARD OF HOME MISSIONS OF THE CONGREGATIONAL AND CHRISTIAN CHURCHES, THE AMERICAN MISSIONARY ASSOCIATION, THE CONGREGATIONAL HOME MISSIONARY SOCIETY, THE CONGREGATIONAL CHURCH BUILDING SOCIETY, THE CONGREGATIONAL SUNDAY SCHOOL EXTENSION SOCIETY, THE CONGREGATIONAL BOARD OF MINISTERIAL RELIEF, CONGREGATIONAL EDUCATION SOCIETY, CONGREGATIONAL PUBLISHING SOCIETY, THE ANNUITY FUND FOR CONGREGATIONAL MINISTERS, RETIREMENT FUND FOR LAY WORKERS, THE CORPORATION FOR THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, and AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS.

Respondents,

JOHN T. BEACH, as Treasurer of the NATIONAL COUNCIL OF CONGREGATIONAL CHURCHES and FRED HOSKINS and JAMES E. WAGNER, as co-Presidents of the UNITED CHURCH OF CHRIST,

Added Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

LOREN T. WOOD,
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80 Pine Street,
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ORRIN G. JUDD,
Attorney for American Board of Commissioners for Foreign Missions,
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DAVID W. PECK,
JOHN T. REDMOND,
of Counsel.

PAUL D. MILLER,
Attorney for Respondent Evangelical and Reformed Church,
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New York 5, New York.

JOHN W. MUELLER,
Co-Counsel for Evangelical and Reformed Church and Added Respondents, Hoskins and Wagner,
St. Louis, Missouri.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
The Basis of Union	4
The Cadman Case	6
The New York Court of Appeals' Decision in the Cadman Case	7
The Present Action	10
The Motion Before Judge Dawson	12
The Proceedings Before Judge Dimock	12
The Court of Appeals Decision	14
The Petition Should Be Denied Because the Decision of the District Court and Court of Appeals Are Manifestly Correct and No Reason for Granting a Writ Is Shown	15
Conclusion	22
Appendix	23

Table of Cases Cited

PAGE

Cadman Memorial Congregational Society of Brooklyn, et al. v. Kenyon, 197 Misc. 124, rev. 279 App. Div. 1015, 1074, aff'd 306 N. Y. 151 .....3, *et seq.*

Campbell v. Nassau County, 192 Misc. 821, 82 N. Y. S. 2d 179 (Nassau Co. 1948), aff'd 274 App. Div. 929, 83 N. Y. S. 2d 511 20

Cold Metal Process Co. v. E. W. Bliss Co., 21 F. Supp. 509 (D. C. Del. 1937) 20

Gart v. Cole, 263 F. 2d 244, certiorari denied 359 U. S. 978 21

General Box Co. v. U. S., 351 U. S. 159 3

Huddleston, et al. v. Dwyer, et al., 322 U. S. 232 3

Israel v. Wood Dolson Co., 1 N. Y. 2d 116 21

Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530 3

Terraqua Corporation v. Emigrant Industrial Savings Bank, 191 Misc. 302, 77 N. Y. S. 2d 689 (N. Y. Co. 1947), aff'd 273 App. Div. 254, 76 N. Y. S. 2d 610, leave to appeal denied 297 N. Y. 1041 20

United States ex rel. Bauer v. Clark, 161 F. 2d 727 (2nd Cir. 1947) 20

Statutes

New York Civil Practice Act:
Section 482 .....4, 20, 23

Supreme Court of the United States

October Term, 1962

No. 705

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, FIRST CONGREGATIONAL CHURCH OF PONTIAC, MICHIGAN, FIRST CONGREGATIONAL CHURCH OF WAUWATOSA, WISCONSIN, MAYFAIR CONGREGATIONAL CHURCH OF TOLEDO, OHIO, MALCOLM K. BURTON, BRUCE H. MASSELINK, ANGUS MACDONALD, HARRY R. BUTMAN, GLADYS T. KENNEDY, NORMAN S. MCKENDRICK, ROY W. ABEL, RICHARD H. PLOCK, JOHN G. PRYOR and FREDERICK GRABOW, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, JOHN T. BEACH, as Treasurer and a member of THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, THE BOARD OF HOME MISSIONS OF THE CONGREGATIONAL AND CHRISTIAN CHURCHES, THE AMERICAN MISSIONARY ASSOCIATION, THE CONGREGATIONAL HOME MISSIONARY SOCIETY, THE CONGREGATIONAL CHURCH BUILDING SOCIETY, THE CONGREGATIONAL SUNDAY SCHOOL EXTENSION SOCIETY, THE CONGREGATIONAL BOARD OF MINISTERIAL RELIEF, CONGREGATIONAL EDUCATION SOCIETY, CONGREGATIONAL PUBLISHING SOCIETY, THE ANNUITY FUND FOR CONGREGATIONAL MINISTERS, RETIREMENT FUND FOR LAY WORKERS, THE CORPORATION FOR THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES and AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS,

Respondents,

JOHN T. BEACH, as Treasurer of the NATIONAL COUNCIL OF CONGREGATIONAL CHURCHES and FRED HOSKINS and JAMES E. WAGNER, as co-Presidents of the UNITED CHURCH OF CHRIST,

Added Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (Dimock, *J.*) granting respondents' motions for a preliminary and separate trial of the defenses of *res judicata* and estoppel by judgment is not officially reported (63a-71a *). The opinion of the District Court (Dimock, *J.*) which denied petitioners' motion to strike respondents' affirmative defenses of *res judicata* and collateral estoppel and upon which the judgment dismissing the complaint was entered is reported at 198 F. Supp. 677. The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 305 F. 2d 724.

The opinion of the District Court (Dawson, *J.*) denying respondents' motions for summary judgment dismissing the complaint is reported at 160 F. Supp. 651 and the opinion of the District Court (Dawson, *J.*) denying the application of others to intervene as parties plaintiffs is reported at 21 F. R. D. 325.

Jurisdiction

Petitioners' statement of jurisdiction is accepted.

---

* References in parentheses, unless otherwise indicated, refer to pages of "Appendix to Plaintiffs-Appellants' Brief" in the United States Court of Appeals, consisting of Volume I, pp. 1a-422a, Volume II, pp. 1b-172b and Volume III, pp. 1c-13c, all of which have been submitted with the petition. References preceded by "R" refer to the record on appeal in the United States Court of Appeals, certain parts of which, submitted with the petition, were handed up to the Court of Appeals in lieu of being printed in the appendices to plaintiffs-appellants' brief. References preceded by "X" refer to pages of the appendix annexed to the petition herein.

Questions Presented

Petitioners' statement of the questions they would present could be accepted, but the questions can be more simply stated: Were the issues raised by plaintiffs in this action adjudicated in the class action brought by the plaintiffs in *Cadman Memorial Congregational Society of Brooklyn, et al.* v. *Kenyon*, 306 N. Y. 151 (1953) (herein referred to as the *Cadman* case), and were the interests of the present plaintiffs (petitioners) in those issues included in the class interests represented by plaintiffs in the *Cadman* case, and are the defendants in this action entitled to the benefit of the adjudication in the *Cadman* case, so that the *Cadman* decision is *res judicata* as to the present action.

No federal question is presented, and we submit that the questions which petitioners would present of the effect of a prior decision of the New York Court of Appeals on the same subject matter, as determined by the District Court and a unanimous Court of Appeals, is neither of a constitutional or general interest which would warrant a review by this Court.

Admittedly, as petitioners assert (Petition, p. 23), the federal courts, whose jurisdiction was invoked by diversity of citizenship, were required to follow the law of New York as to the scope and elements of *res judicata*. Both the District Court and Court of Appeals acknowledged this to be their obligation and action. There is therefore no reason for this Court to depart from its time honored practice of ordinarily accepting the Court of Appeals' interpretation of local law. *General Box Co.* v. *U. S.*, 351 U. S. 159; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530; *Huddleston, et al.* v. *Dwyer, et al.*, 322 U. S. 232.

Statutes Involved

In addition to the statutes set forth in the petition, this case also involves Section 482 of the New York Civil Practice Act (Gilbert-Bliss, Civil Practice of New York, Book 4, p. 54), which is set forth in the Appendix hereto (p. 23, *infra*).

Statement of the Case

Petitioners' statement of the case cannot be accepted. It omits any statement of the allegations of the complaints in the *Cadman* case and the present action, and any statement of the decision of the New York Court of Appeals in the *Cadman* case and of the decisions of the District Court and Court of Appeals in the Present action. Petitioners thus present an unintelligible discussion of academic questions posed without any reference to the issues presented and decided in either the *Cadman* case or present action. The proper application of the tests of *res judicata*—about which there is no dispute—cannot be perceived or determined on such a presentation detached from any consideration of the facts and issues presented and determined in the two cases which must be compared.

We therefore restate the facts.

The Basis of Union

For several years prior to 1947 a Commission on Interchurch Relations and Christian Unity of the General Council of Congregational Christian Churches of the United States, an unincorporated association comprising both laity and clergy representing associations and state or district conferences of Congregational Christian churches, and a committee representing the Evangelical and Reformed Church, conducted studies and negotiations looking toward a union of Congregational Christian Churches and the Evangelical and Reformed Church into the United Church

of Christ (151b; 306 N. Y. at 161). These studies and negotiations resulted in the formulation of a Basis of Union in January, 1947 (151b; 306 N. Y. at 161). The Basis of Union with Interpretations (47b-48b), hereinafter collectively referred to as the Basis of Union, was then submitted by the General Council to the individual Congregational Christian churches, associations and conferences for advice (151b; 306 N. Y. at 161). As more than 72% of the churches voting and 90% of the associations and conferences approved, the General Council regarded this approval as substantially affording the advice which it sought, and at its meeting in February, 1949, voted to consummate the plan of union, which was likewise approved by the Evangelical and Reformed Church (151b; 306 N. Y. at 161).

The union, as contemplated and outlined, was a voluntary uniting of churches, associations and conferences, preserving the autonomy of each in its sphere (Basis of Union III, par. H; Interpretations (d) 48b). It would in no wise abridge the rights previously enjoyed by the churches, including but not limited to freedom of worship and education and the right of holding and operating their own property and retaining or adopting their own regulations (151b-152b; 306 N. Y. at 161). The General Council of Congregational Christian Churches and the General Synod of the Evangelical and Reformed Church, the top bodies of the two denominations, were to unite to form the General Synod of the United Church of Christ (Basis of Union X, pars. B & C). The boards, agencies and instrumentalities affiliated with the two denominations, such as missionary, educational and pension bodies, were to be united (Basis of Union VIII; X, par. D). A constitution for the United Church of Christ based on the principles set forth in the Basis of Union was to be prepared by the General Synod and was to come into force when ratified by two-thirds of the Congregational Christian Churches voting (Basis of Union IV, par. A). That constitution was prepared and was declared in force on July 4, 1961.

The *Cadman* Case

In the *Cadman* case, commenced in April, 1949, the Basis of Union and proposed union were attacked by the two plaintiffs therein, the Cadman church, an unincorporated religious body conducting the services and religious activities of the congregation, and the Cadman Society, a religious corporation having custody and control of the temporalities and property of the congregation. The action was brought as a representative action on behalf of all Congregational Christian churches. The defendant in the action was the General Council of the Congregational Christian churches. The theory of the complaint was that, as the essence of Congregationalism is the autonomy of the individual church and as the Evangelical and Reformed Church was a unitary church organization with a presbyterian form of government, union between the two groups would be incompatible with Congregationalism (153b; 306 N. Y. at 162). The complaint alleged that the various boards, agencies and instrumentalities affiliated with the Congregational Christian churches were "under the direction or control of or affiliated or associated with or supported or managed by the Congregational Christian churches, through said General Council or otherwise" (11b) and that the General Council, unless restrained, would consummate the plan of union, including a merger or consolidation of the boards, which action would deprive Congregational Christian churches desiring to continue as Congregational Christian churches, without becoming members of the United Church of Christ, of their representation in the General Council and of their interest in the Congregational boards and agencies, the funds of which would be mingled with the funds of other unrelated religious organizations and diverted from the uses and purposes to which they were dedicated and to which Congregational Christian churches had the right to have them applied (11b-13b). The relief requested was (1) a declaration that the General Council had no power or authority to carry out the Basis of Union,

that any Congregational Christian church which united with the new church would remove itself from the Congregational Christian fellowship and cease to have any interest in the Congregational Christian agencies, and that the Congregational Christian churches which did not unite with the new church would remain the Congregational Christian Churches in control of the Congregational Christian agencies; and (2) an injunction against the General Council's consummating the union or merging any of the Congregational Christian agencies with the Evangelical and Reformed agencies (16b, 17b).

After a trial the Supreme Court of New York rendered a decision and opinion directing judgment on the merits for plaintiffs (77b-110b; 197 Misc. 124). By stipulation, this opinion constituted findings of fact and conclusions of law (119b). Thereafter judgment was entered, pursuant to the opinion, containing various declarations and an injunction against the General Council (111b-118b). Upon appeal, the Appellate Division, Second Department, one justice dissenting, reversed the judgment of the trial court on the law and facts and dismissed the complaint (279 App. Div. 1015, 1074; 120b, 125b, 136b, 142b); and thereafter a judgment of reversal was entered (X-14; 145b-147b). Upon further appeal, the New York Court of Appeals, two judges dissenting, affirmed the judgment of the Appellate Division, finding that "the complaint was properly dismissed on the merits" (306 N. Y. 151; 148b-165b); and thereafter, pursuant to the Court of Appeals' order and judgment of affirmance (X-17; 166b-168b), final judgment was entered in the Supreme Court (X-20; 171b-172b).

The New York Court of Appeals' Decision in the *Cadman* Case

Two claims were asserted and adjudicated in the *Cadman* case. The first claim was that the Basis of Union provided for a union which would abridge the autonomy of individual churches and thus destroy or materially alter the

nature of Congregationalism. The other claim was that property rights possessed by Congregational Christian churches in the funds and assets of the General Council, its boards, agencies and instrumentalities, would be diverted from the uses and purposes for which they were set up and the non-assenting churches would thus be deprived of their interests in those funds.

As to the first claim, the New York Court of Appeals found that under the Basis of Union no church, association or conference or their members would be subject to any control by the United Church in respect to either their spiritual or their temporal affairs, that the proposed union would in no way change the historical and traditional pattern of the individual Congregational Christian church, that there could be no fear that any action taken by the General Council leading to consummation of the Basis of Union would in any way obligate the individual church to join in the union except through its own voluntary action, that each member church would continue to possess the same freedom of faith and manner of worship as theretofore enjoyed, and that there would be no interference in or abridgement of Congregational usage and practice (151b-152b, 154b; 306 N. Y. at 161, 163). The Court therefore held, "No ecclesiastical question is presented" (154b; 306 N. Y. at 163).

As to alleged property rights in the Congregational Christian boards, agencies and instrumentalities, after noting that there was no question raised with respect to express trusts and that plaintiffs' claim related only to an "alleged beneficial interest in general funds belonging to and used by various boards and agencies in carrying out their respective functions," the New York Court made a review of the charter authority and function of each of the boards and agencies, and found that, while the name "Congregational" appears in most of the agencies, "their express purposes are nonetheless very broad and in no way

limited to furthering any particular religious viewpoint, dogma or confession of faith" and "would not be violated by uniting with any other similar charitable and religious organization" (156b, 157b; 306 N. Y. at 164, 166). The general funds of these agencies were found to have been voluntarily contributed and without restriction as to use or application (158b; 306 N. Y. at 166).

In summary of the plaintiffs' property claim and as its own conclusion, the Court said (158b-159b; 306 N. Y. at 166):

> "Notwithstanding that the above-listed boards and agencies are corporations authorized and existing under the laws of several different States, the plaintiffs nonetheless contend that such boards and agencies have in fact no separate and independent status because their boards of trustees, officers and administrators are drawn from the membership of the General Council and that their activities, are, for all practical purposes, controlled and supervised by the General Council—that diversion of their funds and assets and mingling of same with the funds of others is an interference to its detriment in a property interest belonging to the Cadman Church and other nonassenting churches. This, however, is not established in fact as the proof shows and, it is conceded, the Cadman Church has not contributed any funds, except as we have seen, for other than a general corporate purpose and these voluntarily and without restriction as to use or application. Under such circumstances it must be assumed that such funds were general gifts for use by the corporations in connection with their general corporate purposes. Such voluntary unrestricted contributions for a general charitable and religious purpose create no proprietary or beneficial interest warranting the civil courts in interfering in their expenditure so long as it appears that such use and application is not violative of charter purposes. * * *
>
> "* * * Absent a showing that any fiduciary obligation imposed by the charters or certificates of incorporation of any board or agency will be violated

> or that such violation is imminent or threatened, there is no basis or necessity for a declaratory judgment enjoining the General Council in any respect, nor may any restraining order issue against the various corporate boards and agencies, the Evangelical and Reformed Church or the United Church of Christ, as they have not been made parties defendant and are not before the court".

Finally and overall, the Court said (159b; 306 N. Y. at 167):

> "On this record, the proof having established that the Basis of Union is voluntary and in no way interferes with Congregational faith or manner of worship, and the plaintiffs having failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities, and having failed to show that any such general funds are to be used for other than authorized charter purposes, the complaint was properly dismissed on the merits".

The Present Action

Three and one-half years after the final judgment of the New York Court of Appeals and dismissal of the complaint in the *Cadman* action, the present action was instituted by the present plaintiffs, represented by the same attorneys who represented the plaintiffs in the *Cadman* action.

The plaintiffs are four Congregational Christian churches and nine individuals who are members of Congregational Christian churches, four of whom are ministers of churches and members of the General Council and/or members of one or more of the boards, and one of whom is a member of the General Council and two of the boards. They purport to sue both individually and representatively on behalf of all Congregational Christian churches, members, ministers and members of the General Council and boards. The defendants are the General Council, the

boards, agencies and instrumentalities affiliated with the Congregational Christian denomination and the Evangelical and Reformed Church. Added as defendants, after institution of the action, are the National Council of Congregational Churches and the co-presidents of the United Church of Christ.

The essence of the complaint (95a, 96a, 101a), as of the *Cadman* complaint, is that the General Council has no power to adopt and carry out the Basis of Union, and that the Basis of Union is invalid in attempting to unite religious bodies of different type and character, in abridging the autonomy of churches and in attempting to impress churches and their members into the United Church without affirmative action on their part, and in depriving the churches and their members and ministers of their rights in the boards, as agencies of the Congregational Christian Churches which have been maintained by contributions from Congregational Christian churches and their members. Complaint was then made against defendants' taking enumerated steps to carry out the Basis of Union. The relief requested was a declaration that the Basis of Union is invalid in its various provisions; that churches, members and ministers cannot be regarded as part of the United Church of Christ except by affirmative action on their part; that churches which join the United Church of Christ will "thereby cease to be churches of the Congregatonal Christian faith and order" (328a); that churches which do not join the United Church of Christ will be "The Congregational Christian Churches" (328a); and that the boards of the two denominations cannot proceed to unite as provided in the Basis of Union (321a-322a).

In short, despite an elaboration of verbiage and proliferation of parties, the claims made in the instant action are exactly the same claims as those made in the *Cadman* action.

The Motion Before Judge Dawson

Defendants' first step in the present action was to move to dismiss the complaint on the ground of *res judicata*. Judge Dawson denied the motion, holding that there were triable issues of *res judicata* which could not be decided by summary judgment (49a). The questions delineated by Judge Dawson for a trial determination were whether, as plaintiffs contended, (1) plaintiffs herein have interests in the funds of the General Council, its various boards, agencies and bodies which were not represented by the plaintiffs in the *Cadman* case, and (2) the facts at the time of institution and trial of this action were substantially different from the facts considered by the Court of Appeals in the *Cadman* case.

Upon denial of their motion to dismiss the complaint, defendants answered and pleaded *res judicata* and the case was assigned to District Judge Dimock for all purposes (2a).

The Proceedings Before Judge Dimock

In September, 1959, the defendants moved for an order directing a preliminary trial of the issues of *res judicata*, which motion was granted by Judge Dimock by opinion filed in December, 1959 (3a, 63a-70a). Pre-trial hearings were held on eleven days in January, March, April, May, June and October of 1960, during the course of which three separate pre-trial orders were entered (3a, 242a, 245a, 247a).

At the first pre-trial hearing called by Judge Dimock, defendants requested that plaintiffs be required to specify the interests in the boards which they claimed to have which the class represented by the plaintiffs in the *Cadman* case did not have, and the facts existing at the present time which were claimed to be different from the facts which were before and/or contemplated by the New York courts in the *Cadman* case. By pre-trial orders Nos. 1 and 2, Judge Dimock directed plaintiffs to submit such specifica-

tions (242a-246a), allowing them even to specify "other interests" in the boards and agencies, which they belatedly claimed to have, in addition to their alleged "interests in the funds" of the boards and agencies. The specifications which plaintiffs finally filed (276a-317a) pursuant to these pre-trial orders became the key to the consideration and determination of this action, because they demonstrated, even when accepted at face value, that plaintiffs in the present action represent no different interests from those represented by the plaintiffs in the *Cadman* case and that there has been no change in the factual situation since the *Cadman* decision which would warrant any different decision in the present action.

The trial commenced on November 1, 1960 and continued for six days in that month. After the record was complete with all relevant evidence, defendants rested and plaintiffs moved to strike the affirmative defenses of *res judicata* for failure of defendants to establish a *prima facie* case (R. 17-22).

On March 31, 1961, the District Court rendered its opinion denying plaintiffs' motion (11a-34a). The opinion was a full coverage of every facet of the case, concluding:

> "The result of all of the foregoing is that defendants by their proof have made out a prima facie case of *res judicata* against all of the claims of all of the plaintiffs. While plaintiffs are entitled to adduce any evidence at their command to controvert defendants' proof of *res judicata*, defendants' evidence has not been of a character where any issue of fact can be raised and it is difficult to imagine an affirmative defense to a plea of *res judicata*. Nevertheless, there will be a formal resumption of the trial of the issue of *res judicata* at a time in the near future to be fixed by arrangement with my chambers."

The resumed trial continued for four days in June 1961 (R. 1903-2305A). Plaintiffs complain that the trial court

refused to receive in evidence proffered testimony of "expert" witnesses as to the meaning of the Basis of Union and Constitution of the United Church and additional proffered documentary materials. The "expert" testimony was rejected on an offer of proof because it was not needed as an aid to the court in construing and comparing the Basis of Union and Constitution and upon the further ground, upon which the additional documentary evidence was rejected, that it was merely cumulative and superfluous as the court had accepted plaintiffs' relevant "specifications" at face value (R. 2052, 2276, 2279, 2291).

At the conclusion of the trial, the District Court granted defendants' motion for judgment dismissing the complaint, holding, on the basis of the facts and conclusions set forth in its opinion of March 31, 1961, that the *Cadman* case was in fact and in law an adjudication of all claims asserted by plaintiffs in the present action (R. 2303). The District Court judgment recited that the statements contained in its March 31, 1961 opinion constituted the findings of fact and conclusions of law upon which its final decision and judgment were based (9a-10a).

The Court of Appeals Decision

The judgment of the District Court was unanimously affirmed by the United States Court of Appeals and all of the arguments here advanced by the petitioners were rejected (X3, X13). The Court of Appeals succinctly stated and determined the issues:

> "The issues raised by the appeal can be stated very simply: What was decided by the New York courts in the *Cadman* litigation? and who is bound by that determination under principles of *res judicata?* Plaintiffs maintain that the *Cadman* judgment cannot affect them, because they were not parties in that action and were neither in privity with nor represented by either of the two plaintiffs. They also maintain that the defendants in the present suit

are not the same as those in *Cadman* and thus cannot plead that judgment in bar. Finally, plaintiffs contend that the dismissal of the *Cadman* complaint was solely for failure to join indispensable parties—a flaw they claim to have corrected. Since jurisdiction in this suit is grounded on diversity of citizenship, we look of course to the law of New York to determine these issues (X9).

• • •

"It is our conclusion that as to the issues actually raised and resolved by the New York Court of Appeals in *Cadman*, the plaintiffs therein and the present plaintiffs form one class having common interests, and all were adequately represented by the Cadman Church and Society. Since no legal issue not determined by *Cadman* is raised by the present complaint, the judgment of the district court dismising plaintiffs' complaint must be affirmed (X11).

• • •

"The final point raised is whether those defendants in this case who were not parties in *Cadman* may plead that decree as *res judicata*. Since all the defendants herein have the same interests as the General Council, which defended the *Cadman* litigation, they under the law of New York may claim the benefit of that decision, even if they may not be made to bear its burdens. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 134 N. E. 2d 97, 151 N. Y. S. 2d 1; *Gart* v. *Cole*, 2 Cir., 263 F. 2d 244, certiorari denied 359 U. S. 978" (X13).

The Petition Should Be Denied Because the Decision of the District Court and Court of Appeals Are Manifestly Correct and No Reason for Granting a Writ Is Shown

A reading of the opinions in the District Court and Court of Appeals, which petitioners elect to ignore, are both the clearest exposition of the case and clearest demonstration of the correctness of the decision reached.

Only by ignoring the opinions in all courts, both in the *Cadman* case and present action, and by erroneous state-

ments of and off the record, are petitioners able to contrive an argument. The argument is demonstrably insupportable by any reference to the record and decisions of the several courts involved.

We shall not make a correction of all of plaintiffs' misstatements or reply to all arguments, but shall comment briefly and sufficiently on major errors of statement and argument.

There is no "schism" among Congregational Christian churches, as plaintiffs state (Petition, p. 16) without a record citation. The fact is that the vote of the Congregational Christian churches voting up to May 1961 on approval of the Constitution of the United Church was 93% in favor of the union (R. 1923). The union is thus virtually completed and almost fully supported and the controversy which a few would carry on does not deserve the further attention of this Court.

Judge Dawson, in denying defendants' motion for summary judgment on the ground of *res judicata*, made no such "holding," as petitioners suggest (Petition, pp. 7, 37, 38), that the *Cadman* decision was not *res judicata* as to the present action. Judge Dawson merely decided that there were triable issues as to *res judicata* which should not be summarily decided. The issues were left to the trial held before Judge Dimock.

Petitioners with gross inaccuracy and unfairness to the District Court state that they were accorded only a "pro forma" trial (Petition, pp. 8, 38, 40). Plaintiffs were accorded the widest latitude and utmost indulgence in the exposition of their contentions, as a glance at the pre-trial and trial record makes apparent. The determination of the District Court was made on the basis of taking plaintiffs' specifications of "interests," which they allegedly had and which the *Cadman* plaintiffs allegedly did not have, and

their specification of the alleged "changes" in the facts between the trial of the *Cadman* case and the trial of the present action, at face value, and deciding that plaintiffs' own specifications, elaborated by unlimited argument of plaintiffs' counsel, disclosed no different interests or facts which would avoid the applicability of the principles of *res judicata* (R. 164, 165, 774, 786-787, 2013, 2052, 2084-2086, 2088). As one counsel in the case aptly remarked, the trial judge indulged plaintiffs with a "patience beyond anything required by either the Old or New Testament".

The testimony which petitioners complain of not being permitted to adduce was only proffered "expert" testimony as to the meaning of written documents, the Basis of Union and Constitution of the United Church, which the court held were clear on their face and required no exposition from the witness stand (R. 2276-2277). Contrary to petitioners' assertion (Petition, pp. 8, 40), the court did allow plaintiffs to place the proffered testimony on the record in the form of an offer of proof (R. 2245), from which it may readily be seen that the proffered testimony was properly not received.

Petitioners contend that the decisions rendered by the District Court and Court of Appeals are in conflict with applicable decisions of this Court and the New York Court of Appeals (Petition, pp. 17-33). The argument, without reference to the decisions of any of the courts in either the *Cadman* or present actions, is no more, however, than a citation of cases and assertion that the recognized principles of *res judicata* were not properly applied in the instant case.

There is no question here about the principles of *res judicata*. Indeed, there is no question either of fact or law in this case. The case is entirely one of the application of unquestioned rules of *res judicata* to the unquestioned facts of the case. The opinion of the New York Court of Appeals in the *Cadman* case and the opinions of the District Court

and Court of Appeals in this case make it clear that the *Cadman* decision is *res judicata* as to the present action in accordance with the very principles of *res judicata* cited by petitioners.

The whole of petitioners' argument comes down to the contention that the *Cadman* decision decided nothing, that it was no more than a dismissal of the action for want of essential parties, and that the entire extensive decision of the New York Court of Appeals, ending with the conclusion that the "complaint was properly dismissed on the merits", was merely dicta (Petition, pp. 19, 20, 30). This absurd contenton was given short shrift by both the District Court and Court of Appeals. The Court of Appeals, like the District Court, gave the closest examination to the "full" opinion of the New York Court of Appeals and necessarily found that it was, as that court stated, a determination "on the merits," rather than an intellectual exercise to no point or purpose as petitioners try to make out.

Plainly there was no absence of an essential party to the determination made by the New York Court of Appeals in the *Cadman* case and that Court did not intimate in the one sentence of its opinion on which plaintiffs wholly rely that there was any absence of an essential party or that it was dismissing the complaint for lack of any essential party.*

* The one sentence in the New York Court of Appeals' twelve-page decision to which plaintiffs attach all importance reads: "Absent a showing that any fiduciary obligation imposed by the charters or certificates of incorporation of any board or agency will be violated or that such violation is imminent or threatened, there is no basis or necessity for a declaratory judgment enjoining the General Council in any respect, nor may any restraining order issue against the various corporate boards and agencies, the Evangelical and Reformed Church or the United Church of Christ, as they have not been made parties defendant and are not before the court" (158b-159b; 306 N. Y. at 166). Immediately thereafter and concluding its opinion the New York court said: "On this record, the proof having established that the Basis of Union is voluntary and in no way inter-

The New York Court had before it the General Council of Congregational Christian Churches which had formulated the Basis of Union and which, as alleged in the *Cadman* complaint, threatened to carry out the Basis of Union and would carry it out unless restrained. Clearly, therefore, the General Council was the only necessary defendant in a class action to determine the validity of the Basis of Union and the propriety of its consummation. Equally clearly, on the basis of the allegations of the *Cadman* complaint that the boards were agencies of the churches controlled by the General Council (11b, Cadman complaint, par. 22) and the finding of the trial court in the *Cadman* action that the funds of the boards had been accumulated by the boards "as agencies of the General Council and as agencies in turn of all the Congregational Christian churches" (100b), the New York Court of Appeals, accepting this jurisdictional premise, proceeded to determine the issue of plaintiffs' alleged property interests in the funds of the boards, and, after the fullest consideration of the boards' charters, concluded that plaintiffs had failed to establish any interest in the funds of the General Council, its various boards, agencies and instrumentalities or that such funds were to be used under the Basis of Union for other than authorized charter purposes (158b-159b; 306 N. Y. at 166).

In the light of the all-inclusive presentation and determination of the issues in the *Cadman* case, there is no basis whatever for suggesting that the dismissal of the complaint was nothing more than a dismissal for lack of jurisdiction due to the absence of necessary parties. On the contrary, it is clear, as the New York Court of Appeals held and as the District Court and Court of Appeals held, the

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feres with Congregational faith or manner of worship, and the plaintiffs having failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities, and having failed to show that any such general funds are to be used for other than authorized charter purposes, the complaint was properly dismissed on the merits" (159b; 306 N. Y. at 167).

determination was a complete adjudication of all issues presented.*

Petitioners' companion contention (Petition, pp. 25-27) that the decision of the New York Court of Appeals adjudicated nothing because no declarations were given and the complaint was simply dismissed "on the merits" is similarly frivolous. Under New York law a dismissal of a complaint in an action for a declaratory judgment is, as in any action, in and of itself sufficient to constitute *res judicata*. *Terraqua Corporation* v. *Emigrant Industrial Savings Bank*, 191 Misc. 302, 77 N. Y. S. 2d 689 (N. Y. Co. 1947); aff'd 273 App. Div. 254, 76 N. Y. S. 2d 610, leave to appeal den. 297 N. Y. 1041; *Campbell* v. *Nassau County*, 192 Misc. 821, 82 N. Y. S. 2d 179 (Nassau Co. 1948), aff'd 274 App. Div. 929, 83 N. Y. S. 2d 511; *United States ex rel. Bauer* v. *Clark*, 161 F. 2d 727 (2nd Cir. 1947); *Cold Metal Process Co.* v. *E. W. Bliss Co.*, 21 F. Supp. 509 (D. C. Del. 1937). New York C. P. A. § 482 makes a dismissal of a complaint at the close of the evidence a final determination on the merits unless the court shall specifically make such dismissal without prejudice. Since actions for a declaratory judgment are not excluded from the provisions of this section, the

* Plaintiffs (Petition, p. 24) refer to a footnote in the opinion of the United States Court of Appeals and argue from the observation there made that it is unclear whether the New York Court of Appeals upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil courts. The New York Court of Appeals, after fully considering the polity question, decided that there was no infringement of Congregational principles in the Basis of Union, hence "no ecclesiastical question is presented." But, as the United States Court of Appeals stated in the footnote referred to, "It would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted" because, as the Court had stated in the body of its opinion, "The questions of the validity of the General Council's action and its effect on individual congregations were legal issues in which all the present plaintiffs have the same interest as the *Cadman* plaintiffs, and to which the differences as to their various situations are irrelevant; and thus as to these questions the decree is binding on all" (X 12).

final judgment in the *Cadman* case was on the merits without any recital to that effect. But the New York Court of Appeals at the close of its decision noted that the dismissal was on the merits (159b). Further, the opinion of the New York Court of Appeals was full in its coverage and disposition of all the claims advanced by plaintiffs. Further also is the fact that the *Cadman* action was for an injunction against consummation of the union by the General Council as well as for a declaration of invalidity of the Basis of Union. Affirmance by the New York Court of Appeals of a judgment denying such an injunction was clearly a determination on the merits that it was proper for the merger to go forward. There is no basis for an argument, therefore, that because the decision did not carry a declaratory judgment label it was not an adjudication and *res judicata*.

All of the defendants in the present action are entitled to the benefit of that adjudication, regardless of whether they were bound by it, on the basis of the law of New York as established by the New York Court of Appeals in *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, as recognized by the Second Circuit Court of Appeals in *Gart* v. *Cole*, 263 F. 2d 244, certiorari denied 359 U. S. 978, and in its opinion in this case.

Finally, because their tactics of seeking two "days" in court, one in the state court and another in the federal court, on the same claims have not been availing, plaintiffs complain that the net effect of the decisions below is to "whipsaw" them between the state and federal courts (Petition, p. 21). The image which plaintiffs thus see is only the reflection of their own attempt to play fast and loose between two courts.

Plaintiffs have had more than their due in court consideration of their claims. Their claim of lack of due process in that consideration is hollow indeed. It is they who wilfully refuse to recognize due process and the essential and salutary principles of *res judicata*.

Conclusion

Although the issues herein are admittedly of importance, they have been decided in conformity with long established rules relating to class representation and *res judicata*. There is no federal issue of general interest which would justify intervention by the Supreme Court. Nor is there any conflict between the decision below and any applicable decision of this Court or the law of New York. Plaintiffs have received abundant court consideration with the utmost in due process, and at long last *res judicata* should have its due in this controversy.

The petition should be denied.

Respectfully submitted,

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Attorney for all Respondents other than American Board of Commissioners for Foreign Missions and Evangelical and Reformed Church.

PAUL D. MILLER,
Attorney for Respondent Evangelical and Reformed Church.

ORRIN G. JUDD,
Attorney for American Board of Commissioners for Foreign Missions.

JOHN W. MUELLER,
Co-Counsel for Evangelical and Reformed Church and added Respondents, Hoskins and Wagner.

DAVID W. PECK,
JOHN T. REDMOND,
of Counsel.

January 25, 1963.

APPENDIX

New York Civil Practice Act

Section 482. Effect of Judgment Dismissing Complaint.

A final judgment dismissing the complaint before the close of the plaintiff's evidence does not prevent a new action for the same cause of action, unless it expressly declares that it is rendered upon the merits. A dismissal of a complaint or a counterclaim at the close of the plaintiff's or defendant's evidence, as the case may be, or a dismissal of a complaint or counterclaim at the close of the whole evidence, is a final determination of the merits of the cause of action and bars a new action between the same parties or their privies for the same cause of action unless the court shall dismiss without prejudice.

MOTION FILED JAN 31 1963

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 705

First Congregational Church and Society of Burlington, Iowa, First Congregational Church of Pontiac, Michigan, First Congregational Church of Wauwatosa, Wisconsin, Mayfair Congregational Church of Toledo, Ohio, Malcolm K. Burton, Bruce H. Masselink, Angus MacDonald, Harry R. Butman, Gladys T. Kennedy, Norman S. McKendrick, Roy W. Abel, Richard H. Plock, John G. Pryor and Frederick Grabow, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, John T. Beach, as Treasurer and a member of The General Council of the Congregational Christian Churches of the United States, The Board of Home Missions of the Congregational and Christian Churches, The American Missionary Association, The Congregational Home Missionary Society, The Congregational Church Building Society, The Congregational Board of Ministerial Relief, Congregational Education Society, Congregational Publishing Society, The Annuity Fund for Congregational Ministers, Retirement Fund for Lay Workers, The Corporation for the General Council of the Congregational Christian Churches of the United States, and American Board of Commissioners for Foreign Missions,

Respondents,

John T. Beach, as Treasurer of the National Council of Congregational Churches and Fred Hoskins and James E. Wagner, as co-Presidents of the United Church of Christ,

Added Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

CLARK M. ROBERTSON
324 E. Wisconsin Avenue
Attorney for Arthur L. Hoffman, et al., amicus curiae

Of Counsel:
WALTER S. DAVIS
324 E. Wisconsin Avenue
Milwaukee 2, Wisconsin

HAMMERSMITH-KORTMEYER CO.
MILWAUKEE

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 705

First Congregational Church and Society of Burlington, Iowa, First Congregational Church of Pontiac, Michigan, First Congregational Church of Wauwatosa, Wisconsin, Mayfair Congregational Church of Toledo, Ohio, Malcolm K. Burton, Bruce H. Masselink, Angus MacDonald, Harry R. Butman, Gladys T. Kennedy, Norman S. McKendrick, Roy W. Abel, Richard H. Plock, John G. Pryor and Frederick Grabow, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, John T. Beach, as Treasurer and a member of The General Council of the Congregational Christian Churches of the United States, The Board of Home Missions of the Congregational and Christian Churches, The American Missionary Association, The Congregational Home Missionary Society, The Congregational Church Building Society, The Congregational Board of Ministerial Relief, Congregational Education Society, Congregational Publishing Society, The Annuity Fund for Congregational Ministers, Retirement Fund for Lay Workers, The Corporation for the General Council of the Congregational Christian Churches of the United States, and American Board of Commissioners for Foreign Missions,

Respondents,

John T. Beach, as Treasurer of the National Council of Congregational Churches and Fred Hoskins and James E. Wagner, as co-Presidents of the United Church of Christ,

Added Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Now comes the undersigned and moves the Court for leave to file a brief amicus curiae in support of the Pe-

tition for a Writ of Certiorari heretofore filed herein by petitioners, and represents to the Court as follows, to-wit:

1. That he is a duly enrolled member of the Bar of this Honorable Court and a member of the firm of Robertson, Hoebreckx & Davis, Milwaukee, Wisconsin; that said firm has been retained by the plaintiffs in an action entitled Hoffman, et al. v. Emley, et al., pending in the Circuit Court in and for Waukesha County, State of Wisconsin; that the gravamen of the Complaint in said action is that the plaintiffs are bringing a class action representing the "faithful minority" membership of the First Congregational Church of Oconomowoc, Wisconsin; that the defendants represent the majority members of the said church who by virtue of a simple majority vote determined to change said church's adherence from one of Congregational polity to a new presbyterial type church denominated United Church of Christ; plaintiffs seek declaratory, injunctive and accounting remedies.

2. That the Answer filed by the defendants in the foregoing action alleges as an affirmative defense that the decision of the New York Court of Appeals under the title of "Cadman Memorial Congregational Society of Brooklyn, et al. v. Helen Kenyon," reported in 306 N.W. 151, 166 NE(2d) 481, and the judgment of the District Court for the Southern District of New York in the action *sub judice* are binding on all members of Congregational Churches wherever located and that plaintiffs in the Oconomowoc Church action are precluded from further prosecuting their action.

3. That said Oconomowoc Church action is presently at issue; that your movant's clients have a direct and real interest in whether the Petition for Writ of Certiorari is granted in the action *sub judice*.

4. That tendered herewith is the brief statement of the undersigned, which, if this motion is granted, we request be filed herein.

5. That copies of this Motion and tendered Brief Statement have been served upon counsel of record for all parties and the consent of the petitioner for the writ herein obtained.

CLARK M. ROBERTSON
324 E. Wisconsin Avenue
Milwaukee 2, Wisconsin

Of Counsel:

WALTER S. DAVIS
324 E. Wisconsin Avenue
Milwaukee 2, Wisconsin

To: LOREN T. WOOD
Attorney for all Respondents other than American Board of Commissioners for Foreign Missions and Evangelical and Reformed Church
80 Pine Street
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ORRIN G. JUDD
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PAUL D. MILLER
Attorney for Respondent Evangelical and Reformed Church
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New York 5, N. Y.

STATEMENT ON BEHALF OF ARTHUR L. HOFFMAN, ROBERT GILPATRICK, EDWARD KEENEY, FRANK T. LANG, FRANK CASE, ARNOLD BOETTCHER, and JOHN HARMON, Amicus Curiae.

Arthur L. Hoffman, Robert Gilpatrick, Edward Keeney, Frank T. Lange, Frank Case, Arnold Boettcher and John Harmon respectfully wish to advise this Court that they have commenced, as plaintiffs, an action in the Circuit Court in and for Waukesha County, Wisconsin, against Philip W. Emley, Chas. Block, John H. Lepke, Richard E. Stiles, Malcolm E. Quay, Dr. Donald E. Notbohm and Robert Egerman. The Complaint on file therein states that plaintiffs are members of First Congregational Church of Oconomowoc, Wisconsin, a voluntary association, organized in 1841. The defendants therein were the officers of said association and in control of the property of said church at the time a vote was taken on April 30, 1961, when by a simple majority of the members present at such meeting it was voted to approve the Constitution of United Church of Christ and thereby become "a basic unit" of said Church. The plaintiffs further allege in such action that the United Church of Christ is not Congregational in polity and practice, but is in fact presbyterial. During a discovery examination of the defendant Rev. John H. Lepke, the minister of the Oconomowoc church, an admission was extracted that at least in one instance the practice of United Church of Christ will not be, fundamentally, consistent with and true to 400 years history and traditional practice of Congregational churches.

In reply to plaintiffs' Complaint, defendants have claimed that the decision of *Cadman Memorial Con-*

gregational Society of Brooklyn, et al. v. Kenyon, etc., 306 N.Y. 151, 116 NE(2d) 481, and the decision of the Second Circuit Court of Appeals below, 305 F(2d) 724, are binding upon plaintiffs and foreclose them from further prosecuting their claim under the doctrines *res judicata* and collateral estoppel.

At such time as this affirmative defense and plea in bar comes on for hearing, plaintiffs in the Oconomowoc case will attempt to show that *Cadman* is not binding on them because, *inter alia*, the document under judicial determination in that case was The Basis of Union and Interpretations and that the ultimate decision in that case rested upon a determined defect in parties before the Court; that *Cadman* was not a decision *on the merits* generally, or relevant to a suit where there is schism in a local congregation as to whether the faithful minority are entitled to control the church's property or not, and as to the other rights and legal relations of such a minority.

These friends of the Court wish to respectfully point out that United Church of Christ will undoubtedly continue to press in this Wisconsin action, as it is doing in local actions in other states, the alleged binding effect of *Cadman*, and the decisions of the New York Federal Courts in the case *sub judice*, upon any and all actions brought by minority members faithful to Congregational practice and polity. Unless the writ is granted in this action reviewing the decisions of the Federal courts below and a clarification is obtained authoritatively stating the limited scope and effect of the *Cadman* judgment, especially in respect to any claim of *res judicata* or collateral estoppel based thereon, it would appear that the merits of the controversy raised in the case at bar will

never be adjudicated. It also appears that local Congregational churches may find themselves foreclosed from adjudicating real controversies which have developed as to the civil and property rights and legal relations and as to which faction of the membership in entitled to the temporal property of the church. Such a result would constitute a denial of due process of law and of justice. We accordingly respectfully urge, in the interest of justice, the granting of the writ prayed for by plaintiffs-appellants. The questions involved are of great and widespread importance.

Respectfully submitted,

CLARK M. ROBERTSON
324 E. Wisconsin Avenue
Attorney for Arthur L. Hoffman, et al., amicus curiae

Of Counsel:
WALTER S. DAVIS
324 E. Wisconsin Avenue
Milwaukee 2, Wisconsin

MOTION FILED JAN 31 1963

In The

Supreme Court of the United States

October Term, 1962

No. **705**

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, *et al.*,
Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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THE WEST TOLEDO PUBLISHING CO., INC.

INDEX

Page

Motion for Leave to File Brief Amicus Curiae 1

Brief as Amicus Curiae and Brief in Support of Motion for Writ of Certiorari

I. *Mayfair* Case is of Great General and Public Interest

II. Application of *Mayfair* as Res Judicata Deprives Members of Ohio Churches of their Rights as a Faithful Minority

III. Res Judicata is Based on Judge Dimock's Opinion as Affirmed by the Circuit Court of Appeals in *Mayfair*

Appendix—*Wilson, et al. v. Westminster Congregational Church*

Petition

Answer

Motion for Summary Judgment

Journal Entry

Proof of Service

AUTHORITIES CITED

Page

Bakos v. Takach
14 O. App. 370 9

Cadman Memorial Church v. Helen Kenyon,
195 Misc. 124, 95 N.Y.S. 2d 133, rev'd. 279 App. Div. 1015, 1074, 111 N.Y.S. 2d 808 (2d Dept. 1952), aff'd, 306 N.Y. 151, 116 N.E. 2d 481 (1953).

Harriman v. Northern Securities Corp.
197 U.S. 244, 49 L. Ed. 739 11

Kennedy v. Silas Mason
334 U.S. 249, 256-257, 92 L. Ed. 1347 11

Kemp v. Lentz
46 O. Abs. 28 9

Methodist Church v. Wood
5 Ohio 283 9

Wiswell v. First Congregational Church
14 O.S. 31, 44 9

Wilson, et al. v. Washington Congregational Church
(6th Ohio District, C.A. 5654) 6

In The

Supreme Court of the United States

October Term, 1962

No.

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, *et al.*,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The undersigned, a member of the bar of this Court, as counsel for the plaintiffs in the case referred to in paragraph 3 hereof, respectfully moves this Court for leave to file a brief, annexed hereto, as *amicus curiae* in the above captioned case because there are facts and questions of law which the undersigned believes will not adequately be presented to the Court for consideration, but which are important and relevant to the disposition of this case.

Service of copies of this Motion and Brief have been made on all counsel of record herein as required by Rule 27 of this Court.

The facts and questions of law referred to above are not matters of record in the case before the Court, but arise out of the proceedings in a certain action, now pending on appeal in the Court of Appeals of Lucas County, Ohio, entitled "Keith Wilson, et al, vs. Washington Congregational Church," being cause No. 5654 on the Docket of said Court. The undersigned is counsel for the plaintiffs-appellants in said action.

The broad implications and claims being made as to what was decided by the Courts below in the captioned action, now before this Court, clearly appear from the Ohio case wherein it has been argued, and the trial court has held, that the decision in the Second Circuit Court of Appeals below is *res judicata* as to every question, ecclesiastical or otherwise, any local Congregational church anywhere in the United States can raise in connection with a vote of such a church to join The United Church of Christ, including the issue of whether such "United Church" represents a fundamental departure from the policy and principles of Congregationalism and of such churches. That any such broad claim could or would be made, and successfully argued, does not appear in the record now before this Court.

Said Ohio action was commenced in the Common Pleas Court of Lucas County, Ohio, to vacate and set aside a purported vote of said Washington Congregational Church to approve the constitution of The United Church of Christ and to become a local church of that new denomination. The issues are shown by the pleadings in that case, to-wit:

(a) The Petition alleges that Washington Congregational Church is an Ohio non-profit corporation,

wholly autonomous, not subject to any outside ecclesiastical body, but in fellowship with the General Council of Congregational Christian Churches for the sole purpose of carrying out their common aims; that the faith, creed and polity of said church are expressly provided in the written constitution; that the vote was not taken in accordance with said constitution; and that such a vote constitutes a radical departure from the Congregational polity and principles of said Washington Congregational Church, depriving plaintiffs of their civil and property rights in violation of the Federal and Ohio Constitutions.

(b) The Answer alleges that the decision of the New York Court of Appeals in *Cadman, etc. v. Keegan*, etc., 306 N. Y. 151, 116 NE (2) 481, (the "*Cadman*" case), and the decision of the Second Circuit Court of Appeals below, 305 Fed. (2) 724, in the above entitled action (referred to in the Ohio action as the "Mayfair" case) are *res judicata* and an *estoppel by judgment* of each and every issue raised by the Petition, including the procedural questions, in the Ohio case. These affirmative allegations were denied in plaintiffs' reply.

(c) A Motion for Summary Judgment was filed by the defendant, and in support thereof Loren T. Wood, Esq. (one of the attorneys for the respondents in the captioned case in this Court) stated in an affidavit:

> "All of the issues raised in plaintiffs' Petition have been adjudicated adversely to the plaintiffs' position in the Cadman and Mayfair cases."

(d) In granting said Motion for Summary Judgment the trial judge stated in the journal entry:

> "II. Plaintiffs in the Mayfair case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objection to the voting procedure employed) and said case is res judicata as to such issues."

Thus, on the basis of the foregoing affidavit of counsel herein for the respondents the trial judge in the Ohio case held that the decision below by the United States Court of Appeals, (known as the *Mayfair* case), affirming Judge Dimock's decision, 198 Fed. Supp. 677, determined said issue of departure and other issues raised by the pleadings in the Ohio case and was applicable as *res judicata* to those issues. This summary judgment was granted on September 4, 1962. The opinion of the Second Circuit Court of Appeals below was filed August 1, 1962, and was presented to the trial judge in the Ohio case for consideration before he entered judgment.

As shown above, it has been, and is now being, argued that even though each local Congregational church is a separate legal entity, wholly autonomous, and even though each defines its own faith and polity in its own written constitution, that the *Cadman* case and Judge Dimock's decision, 198 Fed. Supp. 677, as affirmed by the Second Circuit Court of Appeals below on August 1, 1962, finally and conclusively decided every question, ecclesiastical or otherwise, that could be raised by any Congregational church in the

United States under its own written constitution, even though the members of such Congregational church had never heard of the *Cadman* case and had no opportunity to participate therein.

Although the contention has been successfully argued in the trial court in Ohio in the Washington Congregational Church case, it is obvious from a study of the record in the *Cadman* case that the New York Courts never intended their judgment to have any such broad application, and that the lower Federal Courts in the captioned case have misconstrued and misapplied the *Cadman* decision in rendering their decision.

WHEREFORE, the undersigned moves the Court for an order authorizing him to file the annexed brief herein as *amicus curiae* setting forth facts relative to said Ohio litigation, with relevant law, bearing upon the question as to whether this Honorable Court should grant the Petition for a Writ of Certiorari heretofore filed herein.

Respectfully submitted,

R. B. Swartzbaugh
1304 Toledo Trust Building
Toledo 4, Ohio

In The

Supreme Court of the United States

October Term, 1962

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, *et al.*,

against

EVANGELICAL AND REFORMED CHURCH, *et al*

BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF MOTION FOR A WRIT OF CERTIORARI

For brevity, the above captioned case will sometimes be referred to below as the "Mayfair" case, the case of *Cadman, etc. v. Kenyon*[1] as the "Cadman" case, and the case of *Wilson, et al. v. Washington Congregational Church*[2] as the "Ohio" case.

As shown in the foregoing Motion, the trial court in the *Ohio* case, on a Motion for Summary Judgment, held that the issue of *departure* raised by the Petition (par. 12) in the *Ohio* case had been determined in *Mayfair* and that *Mayfair* was res judicata on this issue.

According to the Ohio court, the plaintiffs in *Mayfair* represented a class of which plaintiffs in the *Ohio* case were members and "claimed and sought *declarations of rights* and *interests* in the *subject matter* of the litigation which

Fn. 1 195 Misc. 124, 95 N.Y.S. 2d 133, rev'd, 279 App. Div. 1015, 1074 111 N.Y.S. 2d 808, aff'd, 306 N.Y. 151, 116 N.E. (2) 481 (1953).

Fn. 2 C.A. 5654, Lucas County, Ohio, pending.

included all the rights and interests" asserted by the plaintiffs in the *Ohio* action who, therefore, are estopped by the *Mayfair* judgment from relitigating these issues.

I. Mayfair Case is of Great General and Public Interest.

We believe that the trial court in the *Ohio* case misconstrued the *Cadman* and *Mayfair* decisions, and that both the District Court and the Circuit Court of Appeals in *Mayfair* misconstrued and misapplied the decision in *Cadman*.

However that may be, the decision in the *Ohio* case is one of first impresssion in Ohio and will be used as a precedent unless and until reversed, or until the *Mayfair* case has been clarified. Denial of the Petition for a Writ of Certiorari will be claimed to be an affirmance of the language in the opinion of Judge Dimock incorporated into the judgment entry in the District Court, and to confirm the viewpoint of the proponents of the merger as to what *Cadman* decided.

There are approximately 350 Congregational Christian Churches in Ohio with more than 90,000 members as shown by the 1962 Yearbook. Some of these churches have written constitutions and some do not. Some of these constitutions expressly define the polity and faith of the particular church and some do not. In any event, the provisions of these constitutions are by no means identical.

Nevertheless, in every instance where a vote on the merger has been proposed or taken the members of the con-

gregation have been told that *Mayfair* and *Cadman* decided every legal issue which could possibly be raised in any local congregational church and would prevent the litigation or re-litigation of any such issue by anyone who didn't approve of the merger. On the basis of these representations dissenting members have been urged to forget their convictions and to accept the determination of *Mayfair* and *Cadman* as final.

Furthermore, in every instance of a vote on the merger there has been a substantial minority which sincerely believes and is convinced that the congregational heritage is worth saving and will be lost to their church if it becomes a local church of a new denomination under an overall national constitution, the implications of which are difficult, if not impossible, to ascertain. Never previously had local congregational churches ever been subject to any such national constitution.

In any event, if these contentions are permitted to go unchallenged and this Court denies the Petition for a Writ of Certiorari in the *Mayfair* case, the minority groups of these churches in Ohio will be deprived of their rights as a faithful minority under Ohio law if their church is one which votes to become a local church of this new denomination. We do not believe that the courts in *Mayfair* and *Cadman* ever intended their decisions to have any such effect or application.

II. Application of Mayfair as Res Judicata Deprives Members of Ohio Churches of their Rights as a Faithful Minority.

Under Ohio law a departure from traditional polity, faith or creed by a church gives rise to the rights of a

"faithful minority" and entitles the minority to the continued use of the church property. *Methodist Church v. Wood*, 5 Ohio 283; *Wiswell v. First Congregational Church*, 14 O.S. 31, 44; *Bakos v. Takach*, 14 Ohio App. 370; *Kemp v. Lentz*, 46 O. Abs. 28.

Thus, in *Wiswell v. First Congregational Church*, 14 O.S. 31, 44, supra, the Supreme Court of Ohio stated:

> "Where dissensions have arisen, and schism follows, although it be decided, judicially, that there is no intelligible difference in doctrine or opinion, *those who adhere to the old organization are entitled to its property in exclusion of all others.*" (Emphasis added.)

And in *Bakos v. Takach*, 14 Ohio App. 370, supra, the court held:

> ". . . A court of equity will enjoin the majority of the members of such religious organization from changing the organization so as to effect an avowed change of denominational relations, which would *amount* to a turning over of the property to another separate, distinct denomination. . . ." (Emphasis added.)

The effect of applying *Mayfair* as res judicata or as collateral estoppel to any Ohio church case is to deprive the minority members of that church, if there is a favorable vote for the merger, of any local determination either as to the facts in its own case or the Ohio law applicable thereto, and this is what the proponents of the merger intend. Thus, all litigation could be terminated at the local level on the basis of the *Mayfair* case even though each church involved is a separate legal entity and wholly autonomous, and even

though the minority members of this church never heard about *Mayfair* or *Cadman* previously nor had any opportunity to appear or participate in those cases.

Any careful study of the *Mayfair* and *Cadman* cases shows that it was never intended that those decisions should be given full faith and credit by courts in other states in determining the local rights of faithful minorities. But because of the unique and singular pre-trial practice pursued by Judge Dimock in the District Court, and the affirmance of that judgment by the Circuit Court of Appeals, *Mayfair* is being currently so applied in Ohio, and this application is being urged upon the courts in Michigan and presumably elsewhere.

III. Res Judicata is Based on Judge Dimock's Opinion as Affirmed by the Circuit Court of Appeals in Mayfair.

In the District Court in the *Mayfair* case Judge Dimock adopted his opinion, dated March 31, 1961, into the judgment entry as constituting facts and conclusions of law.[1] In his opinion the District Judge used the following language:

> "The opinion *(Cadman)* went on to say, in substance, that the plan envisaged by the Basis of Union with Interpretations, if accepted by a given Congregational Christian Church, would not constitute an interference in or abridgment of congregational usage or practice. On that basis the judgment dismissing on the merits the suit for declaration was affirmed. . . ."

Fn. 1. Appendix to Plaintiffs-Appellants Brief in Mayfair, Vol. I, p. 10a.

> "I find nothing in the Constitution and By-laws of the United Church of Christ which goes any farther than the Basis of Union with Interpretations in depriving any member of the classes represented by plaintiffs on this action of any rights."

Judge Dimock clearly misconstrued and misinterpreted the decision in *Cadman*, but the Circuit Court of Appeals in *Mayfair* has affirmed the judgment entered in the District Court by Judge Dimock although pointing out in its opinion that no ecclesiastical question was decided in the *Cadman* case. Similar statements were also made by the New York Court of Appeals in the *Cadman* case, as well as in the opinion of the Appellate Division in that case. Nevertheless, the reasoning of the Ohio court appears to be that since the Circuit Court of Appeals in *Mayfair* affirmed Judge Dimock's judgment that it is this judgment which constitutes the decision in *Mayfair* rather than the language of the Circuit Court of Appeals in its opinion handed down on August 1, 1962. See: *Harriman v. Northern Securities Corp.*, 197 U.S. 244, 49 L. Ed. 739.

This also raises the propriety of the pre-trial practice ordered by Judge Dimock. The plaintiffs were denied the right to produce any witnesses or documentary or other evidence. On the basis of statements of legal counsel, taking approximately twelve trial days, Judge Dimock entered judgment purporting to accept statements of plaintiffs' counsel, which he in fact did not accept. We believe that the action of Judge Dimock constitutes an abuse of discretion and should neither be encouraged, authorized or approved as proper pre-trial practice. In a similar case involving summary judgment this Court stated in *Kennedy v. Silas Mason*, 334 U.S. 249, 256-257, 92 L. Ed. 1347:

> "While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

For all of the reasons suggested above, we believe that this Court should grant the Petition for a Writ of Certiorari and that the judgment of the Circuit Court of Appeals affirming the District Court should be reversed.

Respectfully submitted,

SWARTZBAUGH, MOOR & LONGTHORNE

R. B. SWARTZBUAUGH, *Of Counsel*

APPENDIX

In The

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 190424

KEITH WILSON, *et al.*,

Plaintiffs,

vs

THE WASHINGTON CONGREGATIONAL CHURCH OF TOLEDO, LUCAS COUNTY, OHIO

Defendant.

PETITION

1. Plaintiffs are members in good standing of the defendant, Washington Congregational Church.

2. Defendant is a non-profit corporation organized and existing under and by virtue of the laws of the State of Ohio and a member of the Congregational Christian Fellowship with its church building and place of worship in the City of Toledo, Ohio.

3. The General Synod of the United Church of Christ is an ecclesiastical body formed in 1957 for the purpose of merging the Evangelical and Reformed Church and the Congregational Christian Churches of the United States

into the United Church of Christ under a Constitution approved by the General Synod of said United Church of Christ on July 6-8, 1960.

4. Under said Constitution a local church of the Congregational Christian fellowship becomes a local church of the United Church of Christ by approving said Constitution and/or voting to become a part of it. The United Church of Christ is composed of local churches, associations, conferences and the General Synod. Said Associations, Conferences, and General Synod are ecclesiastical bodies. By becoming a part of said United Church of Christ a local church thereof is amenable to said ecclesiastical bodies under said Constitution which expressly provides that actions by, or decisions or advice emanating from, the General Synod, a Conference or an Association, should be held in the highest regard by every local church.

5. Congregational Christian Churches have a heritage and tradition going back more than four hundred years. There are currently approximately six thousand Congregational Christian churches in the United States. Under the congregational system heretofore followed by said churches, each church owns its property, and so far as church government is concerned is autonomous and owes no fealty or obligation to any higher ecclesiastical authority. There is no overall constitution for churches of said fellowship, written or otherwise.

6. In conformity with the said tradition of the Congregational Christian Churches and pursuant to the statutes of Ohio defendant adopted a Constitution and By-laws for the conduct of the business of the church which, at all times mentioned herein, was in full force and effect. Said Consti-

tution and By-laws contained the following provisions, to wit:

a) ARTICLE II **Government and Fellowship**

The government of this church is vested in its members, who exercise the right of control in all its affairs. It is amenable to no other ecclesiastical body, but it accepts the obligations of mutual counsel, comity and co-operation involved in the free fellowship of the Congregational Churches, and pledges itself to share their common aims and work. This church is in direct fellowship with the Toledo Association, the Congregational Conference of Ohio, and the National Council of Congregational Churches of the United States; and with all churches which seek to promote the Kingdom of our Lord, Jesus Christ.

b) ARTICLE XI **Amendments**

This Constitution may be amended by a two-thirds vote of the members present at any Annual Meeting of the Church or at a meeting specially called for that purpose, proposed amendment being inserted in the call. But no change shall be made in Article II except at an Annual Meeting and by a three-fourths vote of the members of the Church present and voting, said proposed change having been laid before the Church in writing at a business meeting not less than one month before the time of the proposed action and read from the pulpit on the Lord's Day next succeeding the proposal.

c) ARTICLE VIII **Meetings**

Public services shall be held each week on the Lord's Day. The Lord's Supper shall be observed

at such season as the Pastor and the Board of Deacons shall determine. The annual meeting of the Church shall be held on the Friday following the second Sunday in January, to hear the yearly reports of the officers, organizations and boards, to elect officers, to transact business and to adopt plans for the new year. Special meetings of the Church may be called by the Minister or the Moderator at the request of the Church Council or any of the boards, or on the written request of five adult members, specifying the objects thereof. Such notice shall be read at the public service on the Lord's Day next preceding the day fixed for such meeting. No special meeting shall be held on the same day on which the notice is given.

A quorum at any meeting of the Church shall consist of 50 voting members. A majority vote of the members shall ordinarily be decisive. The calling of a minister, to be done usually upon the recommendation of not less than two-thirds of the Church Council, shall require a two-thirds vote of all voting members of the Church present at a meeting especially called for this purpose.

7. By letter dated May 8, 1961, the defendant church, announced that a majority of the members of the defendant church voting had voted "yes" on ballots on which the following appeared, to-wit:

"I approve the constitution of the United Church of Christ and thus favor Washington Congregational Church being part of it."

8. Plaintiffs say that any such purported and pretended vote was not taken in accordance with the express, mandatory provisions of the Constitution and By-laws of de-

fendant church and is invalid, without legal force or effect, and should be vacated, set aside, held for naught, and expunged from the church records for the following reasons, to-wit:

a) Article II of the Constitution and By-laws of the defendant church provides that it is "amenable to no other ecclesiastical body". A vote to approve the constitution of the United Church of Christ and to make the defendant church "a part of it" is a vote to amend Article II of the Constitution and By-laws of defendant church. Such a vote can only be taken at an annual meeting and by a three-fourth vote of the members of the church present and voting.

b) No such vote took place at a meeting of the church at which a quorum was determined or declared to be present.

c) There is no provision in the Constitution and By-laws of defendant church for taking a secret vote outside of a regularly constituted meeting of members at which a quorum is present.

d) There is no provision in the Constitution and By-laws which permits the accumulation of votes of members on any subject taken from time to time and outside of a meeting of members duly called in accordance with said Constitution and By-laws.

e) There is no provision in the Constitution and By-laws for absentee ballot, or voting by mail or proxy.

f) There is no provision in the Constitution and By-laws for ratification of a vote of members taken other than in accordance with the provisions thereof.

9. Plaintiffs say that the members of defendant church were advised by letter dated April 19, 1961 that the voting to approve the Constitution of the United Church of Christ and "to become a part of it" would take place on April 30, 1961. The only business to come before the members at the meeting held following sabbath service on that date was the election of a trustee. Prior to and following sabbath service on said date members who wished to vote were required to go to a room adjacent to the foyer of the defendant church, sign their names to a list of the members voting, mark a ballot and deposit the same in a box through a slot.

10. Plaintiffs further say that the same procedure was followed the following Sunday, May 7, 1961 except the only matter of business presented to the meeting following sabbath service was whether the voting procedure was "fair and acceptable". No vote was taken at said meeting on the approval of the Constitution of the United Church of Christ or that the defendant church should become a part of it.

11. Plaintiffs are informed, believe, and therefore allege on information and belief that ballots were furnished to members requesting them to, enable such members to vote by mail, and that such votes have been counted and included in the total vote of all persons claimed to have voted on or before May 7, 1961.

12. Plaintiffs further say that said pretended vote to make the defendant church a part of the United Church of Christ and subject to the overall constitution of said church is a vote involving matters of fundamental and traditional doctrine, faith, dogma, and procedures and a departure from those theretofore held and followed by defendant

church, and would deprive these plaintiffs, as a faithful minority, of their rights in the properties and assets of the defendant church under the Constitution of the United States and the laws and Constitution of the State of Ohio.

13. Plaintiffs say that timely objection was made to the said voting procedures before any announcement was made of the results thereof.

14. Plaintiffs further say that there is a genuine controversy between the parties hereto and that the plaintiffs are without an adequate remedy at law; that said pretended vote should be held and declared to be without legal force or effect and void; and that the defendant church, its officers, trustees, agents, and pastor should be restrained and enjoined from expending any funds of defendant church to carry out the scheme and purpose to make the defendant church a part of the United Church of Christ and subject to the constitution of that church, its Associations, Conferences, and General Synod.

WHEREFORE, plaintiffs pray as follows:

1. For a judgment finding and declaring said pretended vote on said proposed merger to be without legal force and effect and wholly void;

2. For a judgment finding and declaring that a vote of defendant church to approve the constitution of the United Church of Christ and to become a part of it involves matters of fundamental and traditional doctrine, faith, dogma, polity and procedures;

3. For a temporary order restraining and enjoining the defendant church, its officers, trustees, minister, and agents from expending any moneys of defendant church to carry out or put into effect or maintain said proposed merger from its general funds or to transfer or convey any assets of defendant church to said United Church of Christ or to any Board or instrumentality thereof, and that on the final hearing hereof that said order be made permanent.

4. For such other and further relief to which plaintiffs may be entitled, and for their costs herein.

ANSWER

Filed: 8/21/61

Defendant Washington Congregational Church for its answer herein:

SECOND DEFENSE

16. Incorporating all the allegations of its first defense, defendant further alleges:

(a) That an action was heretofore instituted in the Supreme Court of the State of New York, County of Kings, by the Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated, against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final jr lg-

ment in the said action was rendered on the merits in favor of said defendant and against said plaintiffs. The decisions in said action are reported at 195 Misc. 124, 95 N. Y. S. 2d 133, rev'd, 279 App. Div. 1015, 1074, 111 N. Y. S. 2d 808 (2d Dept., 1952), aff'd, 306 N. Y. 151, 116 N. E. 2d 481 (1953). Defendant refers to the opinion of the Court of Appeals in said action dated December 3, 1953, and incorporates the same herein by reference.

(b) In the aforesaid action (hereinafter referred to as the "Cadman case"), plaintiffs representing the class represented by the plaintiffs in the present action, claimed and sought declarations of rights and interests in the subject matter of the litigation which are, in all substantial respects, identical with the rights and interests asserted by the plaintiffs herein and for which declarations and injunctions are sought in the present action.

(c) The judgment entered in the Cadman action in favor of the defendant therein and against the plaintiffs therein *was a final adjudication rendered on the merits on the "identical" cause of action stated in the Complaint* herein and, as such, is binding on the plaintiffs herein and the class which they represent, and is fully determinative of all the issues which were or could have been presented in that action and which are now sought to be presented to this Court.

(d) By reason of the aforesaid judgment rendered in favor of the defendant and against the plaintiffs and the class they represented in the Cadman action, the subject matter of the Complaint herein has been previously adjudicated and determined.

17. Alleges that in an action pending in the United States District Court of the Southern District of New York, Civil Action No. 121-353, in which the plaintiffs in this action are represented by the First Congregational Church and Society of Burlington, Iowa, Mayfair Congregational Church of Toledo, Ohio, its minister Angus MacDonald and others, as plaintiffs, (hereafter referred to as the "Mayfair case") and in which the defendant is represented by Fred Hoskins and James E. Wagner, as Co-Presidents of the United Church of Christ, and others, as defendants, on or about the 11th day of June, 1961, judgment was rendered by which it was adjudged and determined that the plaintiffs in the Cadman suit represented the members of all other Congregational Christian Churches including the parties to this action and that other Congregational Christian Churches and their members do not have interests substantially different from the Cadman Church so as to give them the right to a private redetermination of the validity of the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches that in the Mayfair case it was further adjudged and determined *that in the Cadman case,* the Court of Appeals of N. Y. had made an adjudication binding upon all of the members of Congregational Christian Churches that:

> "Under the Basis of Union no Congregational Christian Church, association, conference, or their members, would be subject in respect to either their spiritual or temporal affairs to any control by the proposed United Church of Christ. Freedom of worship and education at present enjoyed would be preserved in the United Church and not abridged. No individual church would be obligated to join the union

except through its own voluntary action. Each member church would continue to possess the same freedom of faith and manner of worship as theretofore enjoyed. There would be no interference in or abridgement of Congregational usage and practice. Under these circumstances no ecclesiastical question was presented."

Plaintiffs are concluded and bound by said judgments and determinations as to all issues litigated, or which could have been litigated, in said action.

THIRD DEFENSE

18. Incorporating all the allegations of its first and second defenses, defendant further alleges:

(a) That the aforesaid decision and judgment in the Cadman case established that the Basis of Union with Interpretations was legally entered into and is valid; that the General Council had authority and power to enter into the compact represented thereby and to carry out the terms thereof; that the Basis of Union, by its express terms, preserves to the respective local churches, conferences, conventions and associations complete autonomy of self-government; that under the Basis of Union there will be no intrusion in or abridgment of traditional congregational polity and usage through fellowship of independent autonomous congregations free of authoritative control; that the proposed union will in no way change the historical and traditional pattern of the individual Congregational Christian Church; that no action taken by the General Council leading to a consummation of the Basis of Union will in

any way obligate the individual church to join in the union, except through its own voluntary action; that each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed; that no changes in the constitutions and by-laws of local churches occurred by reason of the merger or by the approval of the Constitution of the United Church of Christ by a local church; that there will be no interference in or abridgment of congregational usage and practice; that the very nature of Congregationalism insures the integrity of the individual Congregational Christian Church, its faith and independence; that under the Basis of Union with Interpretations no ecclesiastical question is presented; that no trust funds or assets, including pension funds, held by or under the control of the defendant are in any way affected by the Union; that there is no threat or prospect of violations of or changes in the charters and Certificates of Incorporation of the defendant.

(b) Such determinations were again presented and finally adjudicated in the Mayfair case wherein it was specifically determined that the Cadman case made an adjudication *finding* upon all the members of the Congregational Christian Churches and plaintiffs are estopped from raising such issues in this action.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Filed March 13, 1962

Now comes defendant, Washington Congregational Church, the action herein being at issue, and upon the plead-

ings herein and the affidavits filed in support hereof, moves the Court for a summary judgment in its favor on each and all of the issues raised in the above entitled cause said motion being made severally as to each issue, for each and all of the following reasons:

1. The *subject matter* of the petition herein has been previously adjudicated and determined in the cases of "Cadman Memorial Congregational Society of Brooklyn and Cadman Memorial Church suing on behalf of themselves and other Congregational Churches similarly situated against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States as defendant" (195 Misc. 124, 95 N.Y.S. 2d 133, rev'd, 279 App. Div. 1015, 1074, 111 N.Y.S. 2d 808 (2d Dept. 1952), aff'd, 306 N.Y. 151, 116 N.E. 2d 481 (1953)), hereinafter referred to as the "*Cadman case*" and in the case of "First Congregational Church and Society of Burlington, Iowa vs. Evangelical and Reformed Church et al." United States District Court, Southern District of New York, 198 Fed. Supp. 677 (1961), hereinafter referred to as the "*Mayfair* case". *The foregoing were class actions* and the plaintiffs in the present action are members of the class represented by the plaintiffs in the *Cadman* and *Mayfair* cases. Therefore, plaintiffs are *barred* from maintaining this action.

2. Plaintiffs are estopped by the judgments entered in the *Cadman* and *Mayfair* cases to the extent of the following issues which were conclusively determined therein:

That the Basis of Union with Interpretations was legally entered into and is valid; that the General Coun-

cil had authority and power to enter into the compact represented thereby and to carry out the terms thereof; that the Basis of Union, by its express terms, preserves to the respective local churches, conferences, conventions and associations complete autonomy; that under the Basis of Union there will be no intrusion in or abridgment of traditional congregational polity and usage through fellowship of independent autonomous congregations free of authoritative control; that the proposed union will in no way change the historical and traditional pattern of the individual Congregational Christian Church; that no action taken by the General Council leading to a consummation of the Basis of Union will in any way obligate the individual church to join in the union, except through its own voluntary action; that each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed; that no changes in the constitutions and by-laws of local churches occurred by reason of the merger or by the approval of the Constitution of the United Church of Christ by a local church; that there will be no interference in or abridgment of congregational usage and practice; that the very nature of Congregationalism insures the integrity of the individual Congregational Christian Church, its faith and independence; that under the Basis of Union with Interpretations no ecclesiastical question is presented; that no trust funds or assets, including pension funds, held by or under the control of the defendant are in any way affected by the Union; that there is no threat or prospect of violations of or changes in the charters and Certificates of Incorporation of the defendant; that the *Cadman* case made an adjudication binding upon all the members of

the Congregational Christian Churches and plaintiffs are estopped from raising such issues in this action; and that the Constitution of the United Church of Christ does not depart from the Basis Of Union with Interpretations, nor does said constitution bring about any change in the situation existing previous to its adoption insofar as the rights of the plaintiffs herein are concerned.

3. The subsidiary procedural issues relating to the method of voting originally, upon the record before the Court, clearly are without merit; and subsequent votes, including one taken at the direction of the Court, render any objections to the original vote entirely moot.

Defendant is filing herewith affidavits of J. Theodore Bertsch, William Kamke and Lorin T. Wood, and a brief in support of the foregoing motion.

JOURNAL ENTRY

This day this cause came on to be heard on plaintiffs' motion that conclusions of fact be found separately by the Court from conclusions of law; plaintiffs' one suggested conclusion of fact; defendant's objection to plaintiffs' proposed conclusion of fact and suggestions as to same; and plaintiffs' objections to proposed findings of fact and conclusions of law submitted by defendant; and the oral arguments, briefs and statements of counsel in connection therewith; and the Court being fully advised in the premises, finds that the motion that conclusions of fact be found separately by the Court from conclusions of law should be

and the same hereby is granted to the extent and in the manner hereinafter set forth.

This day this cause further came on to be heard on the petition, answer, supplement to answer, reply, defendant's motion for summary judgment (and the affidavits and exhibits filed in support thereof and in opposition thereto or introduced in evidence at the time of the hearing), the records and briefs in prior litigation (hereinafter referred to), the oral arguments, briefs and statements of counsel, and upon the evidence.

The petition in this action brought by the named plaintiffs as members of defendant Washington Congregational Church alleges that the vote of said church to become a part of the United Church of Christ effected a departure from the traditional doctrine, faith, dogma and procedures formerly held by defendant church as a church of the Congregational Christian faith and order, and as such deprived plaintiffs of their rights in its properties and assets. The petition also objects to the procedure employed in taking such vote. The petition seeks to have the aforesaid vote declared void and to restrain defendant from carrying out the aforesaid vote in any way.

Defendant's answer contains a general denial and affirmative defenses in which it is alleged that issues here sought to be determined have already been adjudicated in two prior class actions in which the plaintiffs here were represented by the class plaintiffs which created an estoppel by judgment and was res judicata as to such issues. It is upon these defenses that defendant moves for summary judgment.

THE COURT BEING FULLY ADVISED IN THE PREMISES, FINDS that the pleadings, affidavits, admissions of the genuineness of papers and documents, and the evidence before the Court, show that there is no genuine issue as to any material fact but only disputed questions of law and that defendant Washington Congregational Church is entitled to judgment as a matter of law.

THE COURT FURTHER AND SEVERALLY FINDS AND SPECIFIES that each of the following facts exists without controversy or is not actually and in good faith controverted, to-wit:

1. An action was heretofore instituted in the Supreme Court of the State of New York, County of Kings, by the Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Church similarly situated, against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final judgment in the said action (hereinafter referred to as the "Cadman case") was rendered in favor of said defendant and against said plaintiffs. The decisions in said action are reported at 195 Misc. 124, 95 N. Y. S. 2d 133, rev'd., 279 App. Div. 1015, 1074, 111 N.Y.S. 2d 808 (2d Dept. 1952), aff'd. 306 N.Y. 151, 116 N. E. 2d 481 (1953).

2. An action was heretofore instituted in the United States District Court for the Southern District of New York by the Mayfair Congregational Church of Toledo, Ohio, its minister Angus MacDonald, one of its members, and others, as plaintiffs against Evangelical and Reformed

Church, and others as defendants. Final judgment in that action (hereinafter referred to as the "Mayfair case") was rendered in favor of defendants and against plaintiffs, the decision being reported at 198 Fed. Supp. 677, under the title First Congregational Church and Society of Burlington, Iowa, et al, plaintiffs v. Evangelical and Reformed Church, et al, defendants. (Aff'd. Aug. 1, 1962, C. A. 2d Docket No. 27258).

3. On May 8, 1961, defendant Washington Congregational Church issued a letter to all its members announcing that a majority of such members had voted to approve the Constitution of the United Church of Christ and in favor of Washington Congregational Church becoming a part of it. Said vote was 154 for and 55 against approving such Constitution. The events leading up to the issuance of said letter dated May 8, 1961 by defendant are set forth in Paragraphs 7 to 11 inclusive of defendant's Answer and Appendix A and Appendix B thereto.

4. Upon the filing of the petition in this case a temporary injunction was issued without notice to defendant or any hearing thereon, and service of the same, together with summons in this case, was served upon plaintiff Earl Dew as statutory agent for defendant.

THE COURT CONCLUDES AS MATTERS OF LAW THAT:

I. Plaintiffs in the Cadman case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights

and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

II. Plaintiffs in the Mayfair case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

III. Washington Congregational Church has taken lawful and proper procedure to approve the Constitution of the United Church of Christ and become a part of it and is now a local church of the United Church of Christ.

IV. The vote to approve the Constitution of the United Church of Christ and in favor of defendant, Washington Congregational Church, being a part of it, was in all respects legal and proper and did not involve any change whatsoever in the Constitution of defendant church.

V. The procedure employed by defendant on and prior to May 7, 1961, to secure a vote on approving the Constitution of the United Church of Christ and in favor of defendant church becoming a part of it, was in all respects legal and proper.

VI. The temporary injunction issued upon the filing of this case, without notice to defendant or hearing thereon, ought not to have been granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the temporary injunction heretofore issued in this cause without notice or hearing be and the same is hereby dissolved and terminated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' petition herein be and the same is hereby dismissed with prejudice at plaintiffs' costs and that judgment be and the same hereby is entered for defendant against plaintiffs for such costs.

To each adverse portion of this journal entry the respective parties object and except.

PROOF OF SERVICE

This is to certify that copies of the foregoing have been mailed by registered mail, return receipt requested, this 30th day of January, 1963, to the following counsel of record, to-wit:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 705

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA, FIRST CONGREGATIONAL CHURCH OF PONTIAC, MICHIGAN, FIRST CONGREGATIONAL CHURCH OF WAUWATOSA, WISCONSIN, MAYFAIR CONGREGATIONAL CHURCH OF TOLEDO, OHIO, MALCOLM K. BURTON, BRUCE H. MASSELINK, ANGUS MACDONALD, HARRY R. BUTMAN, GLADYS T. KENNEDY, NORMAN S. MCKENDRICK, ROY W. ABEL, RICHARD H. PLOCK, JOHN G. PRYOR and FREDERICK GRABOW, suing on behalf of themselves and all others similarly situated,

Petitioners,

against

EVANGELICAL AND REFORMED CHURCH, JOHN T. BEACH, as Treasurer and a member of THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, THE BOARD OF HOME MISSIONS OF THE CONGREGATIONAL AND CHRISTIAN CHURCHES, THE AMERICAN MISSIONARY ASSOCIATION, THE CONGREGATIONAL HOME MISSIONARY SOCIETY, THE CONGREGATIONAL CHURCH BUILDING SOCIETY, THE CONGREGATIONAL SUNDAY SCHOOL EXTENSION SOCIETY, THE CONGREGATIONAL BOARD OF MINISTERIAL RELIEF, CONGREGATIONAL EDUCATION SOCIETY, CONGREGATIONAL PUBLISHING SOCIETY, THE ANNUITY FUND FOR CONGREGATIONAL MINISTERS, RETIREMENT FUND FOR LAY WORKERS, THE CORPORATION FOR THE GENERAL COUNCIL OF THE CONGREGATIONAL CHRISTIAN CHURCHES OF THE UNITED STATES, and AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS,

Respondents,

JOHN T. BEACH, as Treasurer of the NATIONAL COUNCIL OF CONGREGATIONAL CHURCHES and FRED HOSKINS and JAMES E. WAGNER, as co-Presidents of the UNITED CHURCH OF CHRIST,

Added Respondents.

PETITIONER'S REPLY BRIEF

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INDEX

PAGE

General Statement in Reply 1

Respondents, and the Courts Below, Have Ignored the Applicable Rules of *Res Judicata* and Collateral Estoppel and the Limitations Thereof Peculiar to Declaratory Judgments 9

Res Judicata and Collateral Estoppel are Doctrines of Bar or Estoppel by Judgment, Not by Opinion 10

The Judgment in *Cadman* Did Not Adjudicate on the Merits the Issues Presented Therein and Was Never Intended to Do So; and, Cannot, Under Due Process of Law, Constitute a Bar to This Action 12

Defendants' Positions Here and in *Cadman* are Totally Inconsistent 15

Legal Authorities Cited by the Respondents and the Courts Below Do Not Support the Proposition Asserted by Them 17

Conclusion 19

TABLE OF CASES CITED

American Surety Co. v. *Baldwin*, 287 U. S. 156 (1932) 6

Brown v. *Bullock*, 17 App. Div. 2d 424 (1st Dept. 1962) 14

Dick v. *New York Life Ins. Co.*, 359 U. S. 437 (1959) 5

Dred Scott v. *Sanford*, 19 Howard (60 U. S.) 393 15

Free Church of Scotland v. *Overtoun*, 91 L.T. 394 (1904), A.C. 515 2

PAGE

Gart v. *Cole*, 263 F. 2d 244 (2nd Cir. 1959) cert. den. 359 U. S. 978 ..... 17, 18

Good Health Dairy Products Corp. v. *Emory*, 275 N. Y. 14, 9 N.E. 2d 758 (1937) 18

Greenberg v. *DeHart*, 4 N. Y. 2d 511; 151 N.E. 2d 891 (1958) 13

Helm v. *Zarecor*, 222 U. S. 32 (1911) 2

Israel v. *Wood Dolson*, 1 N. Y. 2d 116, 134 N.E. 2d 97 (1956) 17

Lawlor v. *National Screen Service*, 349 U. S. 322 (1955) 7, 10, 19

Mink v. *Keim*, 291 N. Y. 300 (1943) 13

Murray v. *Pocatello*, 226 U. S. 318 (1912) 15

Overseas News Agency v. *Overseas Press*, 185 Misc. 1010; aff'd 270 App. Div. 754; 59 NYS 2d 914 (1st Dept. 1946) 14

Purcell v. *Summers*, 126 F. 2d 390 (4th Cir. 1942) cert. den. 317 U. S. 640 (1942) 3

Ripley v. *Storer*, 309 N. Y. 506; 132 N. E. 2d 87 (1956) 10

Rudd v. *Cornell*, 171 N. Y. 114; 63 N.E. 823 (1902) 10

Sarama v. *Sarama*, 261 App. Div. 875; 25 NYS 2d 129 (4th Dept. 1941) 13

Six Companies v. *Highway Dist.*, 311 U. S. 180 (1940) 5

Stoner v. *New York Life Ins. Co.*, 311 U. S. 464 (1940) 5

Watson v. *Jones*, 13 Wall. (80 U. S.) 679 (1871) 2, 3

West v. *American T. & T. Co.*, 311 U. S. 223 (1940) 5

Statutes

	PAGE
United States Const. Art. IV, §1	6
Revised Rules of Supreme Court, Rule 19, Sec. 1(b)	4
New York Civil Practice Act	
§193	14
§473	14
§482	13
New York Rules of Civil Practice	
Rule 193	14

Authorities

American Jurisprudence:	
Vol. 17 "Dismissal" §95	15
Vol. 17 §105	14
§ 96	7
American Law Reports:	
Vol. 10 2d 782, 783, 784, 786, 787; 2nd Supplement Service (1962) p. 181	9
Cahn, "The Sense of Injustice" pp. 13-14 (1949)	4n
Restatement of Judgments:	
Comment *b* to §77	9
Ch. 3 "Introductory Note", pp. 157-163 and §§41-6, 48-9, 68	10
§49a	14
§52(g)	14

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Supreme Court of the United States

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Added Respondents.

PETITIONER'S REPLY BRIEF

General Statement in Reply

Respondents' brief in opposition, while admitting the importance of the issues herein (Res. Br. p. 22), takes a disdainful approach to the entire matter—a matter which is of vital importance legally and generally to thousands

of churches and ministers and hundreds of thousands of members of the historic Congregational Christian Churches of the United States.

Respondents do not attempt to answer the major points in the Petition, or to discuss the rules of law therein. Respondents do make a feeble, but faulty, effort to state one additional point of New York law (Res. Br. p. 20), dealt with hereafter.

Quite shocking is respondents' suggestion that because of the relative size of the contending parties, this controversy "does not deserve the further attention of this Court" (Res. Br. p. 15). Simply because they represent a majority, respondents have no lawful right to confiscate, for the United Church of Christ, the use, control and funds of all of the denominational agencies of the Congregational Christian Churches and to assert herein that the *Cadman* opinion gave them full right to do so.

Contrary to respondents' effort to minimize the matter, this is the most important case, in this class of case, to come before this Court since *Watson* v. *Jones*, 13 Wall. (80 U. S.) 679 (1871) which involved a schism in the Presbyterian Church, and *Helm* v. *Zarecor*, 222 U. S. 32 (1911) which involved a union of two Presbyterian Church denominations and the use and control of a corporate publishing agency of one. It is comparable to the famous English case of *Free Church of Scotland* v. *Overtoun*, 94 L.T. 394 (1904) A.C. 515 involving a union of two Scottish presbyterial church bodies.

This case is novel and of far greater importance and wider interest, than any of those cases. It involves a church union, as well as a church schism, of national scope in one of the largest, most historic American church denominations.

In *Watson*, at page 714, this Court recognized that when, in such a situation, an appeal is made to the civil courts, they "must perform their functions as in other cases" and that:

> "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."

This case is particularly appropriate for determination under the Federal Declaratory Judgment Act. *Purcell* v. *Summers*, 126 F. 2d 398 (4th Cir. 1942); cert. den. 317 U. S. 640 (1942).

Both the appellate courts in *Cadman* and the courts below herein have avoided the merits of this tremendously important controversy, the New York courts on the ground they lacked power and jurisdiction to render a declaratory judgment in absence of named indispensable parties and the Federal courts below on the ground that the *opinion* in *Cadman* was *res judicata* here as to all issues and all parties. At least, the New York courts left it open for basic issues in this controversy to be adjudicated by the declaratory judgment remedy in an "appropriate action" in which such absent parties were brought before the Court (138b-141b; 159b; 162b-163b). That "appropriate action" is this case.

The purpose of law suits, and this law suit, is *not* simply "to get things decided", as District Judge Dimock observed (12a), but to effect justice and to effectively determine the merits of the controversy. A sense of injustice and lack of constitutional due process pervades all of the proceedings below, because of the courts' seeming

lack of desire to face and decide the real issues and to give these plaintiffs at least *one* "day in court" (Res. Br. p. 21) and one trial and one adjudication, on the merits, of their rights and legal relations (Petition, p. 18, 22-23).*

Respondents dyny any "schism", but not, significantly, the fact that 1365, or at least 25%, of the former Congregational Christian Churches have refused or failed to become part of the United Church of Christ (Petition p. 16). This is to say nothing of controversies between minority and majority members in local churches over votes taken there, as evidenced by the *amici curiae*. It ignores the fact, of record, that the Basis of Union was widely opposed (78b, 160b) and the General Council never received the requisite vote of approval and advice which it sought from the churches, members, associations and conferences (80b-82b, 53b-54b, 78b, 160b). On the record in the District Court, not a single Congregational Christian Church had yet joined the defendant United Church of Christ, which was simply a union of defendant General Council with defendant Evangelical and Reformed Church (85a-86a, 167a-168a, 172a, 304a).

Moreover, the District Court excluded, on defendants' objections, all evidence offered by plaintiffs as to the voting statistjes up to the date of the "trial"; and the reference in Respondents' brief (p. 16) is to such excluded evidence (R. 1922, *et seq.;* Pl. Ex. 5 for id.; R. 1943; 1947, 1949).

Respondents assertion (Res. Br. p. 3), that this Court should accept the U. S. Court of Appeals' interpretation of New York law would render meaningless Section 1(b) of Rule 19 of the Revised Rules of this Court that one of

* Cf. "The Sense of Injustice," by Prof. Edmond N. Cahn, pp. 13-14 (1949).

the "special and important reasons" for granting review on a writ of certiorari is:

> "Where a court of appeals * * * has decided an important state or territorial question in a way in conflict with applicable state or territorial law; * * *"

This Court, often, has reviewed and reversed erroneous interpretations of state law by Courts of Appeal in diversity cases, *e.g.*: *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437 (1959); *Six Companies* v. *Highway Dist.*, 311 U. S. 180 (1940); *West* v. *American T. & T. Co.*, 311 U. S. 223 (1940); *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464 (1940).

Furthermore, both the courts below failed to mention the law of New York (Petition, pp. 23-33) as to the necessary elements of *res judicata* and collateral estoppel, in relation to declaratory judgment actions.

For example, the courts below ignored the New York law that the Court of Appeals has no power to grant a declaratory judgment, by judgment or opinion, or to make new findings; *res judicata* and collateral estoppel are doctrines of estoppel by "judgment," not by "opinion," and the "determination" of an action is the "judgment" not the "opinion"; no "adjudications" or "findings" are deemed made unless set forth in the judgment itself; and a dismissal of a declaratory judgment complaint for lack of power or jurisdiction to render a declaratory judgment in absence of indispensable parties, is not an "adjudication" of the merits of the claim or a bar to another declaratory judgment action wherein such parties are before the Court.

In any event, and certainly in such circumstances, this Court would not be bound to rely on the Court of Appeals for the applicable New York law.

The plain fact is that the courts below, in barring this action, have disregarded and ignored the law of the *Cadman* case itself.

The law of the *Cadman* case was that the New York courts had no power or jurisdiction to grant a declaratory judgment, effectively determining that controversy, in the absence of indispensable parties; and that the declaratory judgment remedy would be "available" in an "appropriate action" in which those parties were before the Court. *This action* being such an "appropriate action", the courts below were required to give full faith and credit to that judgment in *Cadman* (U. S. Const. Art. IV §1; *American Surety Co. v. Baldwin*, 287 U. S. 156, 165 (1932)).

The precise subject matter of the Basis Union and of *Cadman* complaint and the declarations sought there, is in the record (11b-18b). None of the "claims" asserted in *Cadman* were "adjudicated" on the merits (cf. Res. Br. pp. 6-10). The Appellate Division refused to make any findings or declarations (135b). The Court of Appeals had no power to do so (Petition, p. 26). The Appellate Division did not consider or make any determination upon questions of doctrine, polity or other ecclesiastical matters (139b, 146b).

Respondents seem confused as to whether "no federal question", or "no federal issue of general interest", is presented here. Actually, presented here are important federal and constitutional questions (Petition, pp. 17-41).

Respondents' statement that "The claims made in the instant action are exactly the same claims as those made in the *Cadman* action" (Res. Br. p. 11) is sheer nonsense. On a par is respondents' further statement that there has been no material change in the factual situation since *Cadman* (Res. Br. p. 13). That such comments are absurd

is apparent from a mere cursory comparison of the complaint in *Cadman* (1b-18b) with plaintiffs' complaints (72a, 165a, 176a) and Statements (293a, 319a, 248a, 276a, 285a) in this action.

The truth is that only several of the many declarations sought in this action, as to the various plaintiffs and defendants, are even similar to those sought in *Cadman;* and the great preponderance of the allegations and tendered issues in the complaint herein, concern material actions and events which occurred after the trial and judgment in *Cadman* and the defendants who were not parties in *Cadman.*

Accordingly, under the decisions of this Court (*Lawlor* v. *National Screen Service*, 349 U. S. 322, 328 (1955)) and the related law of New York (Petition, pp. 24-25, 31-32), the judgment in *Cadman* could not, in any event, be a bar to this action. See, also, 17 Am. Jur. page 166, §96, Note 17 and 49 A.L.R. 2d 1058.

Respondents twice quote (Res. Br. 9-10; fn. pp. 18-19), from the Court of Appeals' opinion in *Cadman*, but in each instance carefully omit the *key*, decisive sentence which reads: (159b; 306 N. Y. 151, 167):

> "*Such a remedy is available only in an appropriate action, which this is not (Civ. Prac. Act §§193, 473; Manhattan Storage & Warehouse Co.* v. *Movers & Warehousemen's Assn., 289 N. Y. 82; Ivory* v. *Edwards, 304 N. Y. 949).*" (emphasis supplied.)

These citations in that context refer to the unquestionable New York rule that the court must refuse a declaratory judgment in the absence of indispensable persons "whose absence will prevent an effective determination of the controversy" or whose interests are not severable

and would be inequitably affected by a judgment rendered between the parties before the court."

This statement and disposition is completely in harmony with similar statements in the minority opinion (162b, 163b; 306 N. Y. 151, 170) and in the majority and minority opinions of the Appellate Division (138b, 139b-140b; 279 App. Div. 1074).

Surely the Court of Appeals and the Appellate Division was not engaging in "idle talk" in stating that the remedy of declaratory judgment would be "available" to determine plaintiffs' rights in an "appropriate action"; and, in stating, also, that they were not passing on plaintiffs rights (163b, 138b). Certainly those courts never intended the judgment there to be urged or held as *res judicata* in respect of such an "appropriate action". For that to be so would be a mockery, because the very remedy said to be available in another action would be denied.

The opinions below are printed in the record (Petition, pp. X-4—X-13; 11a-34a). They are both predicated upon the basic fallacy that the New York Court of Appeals, in its *opinion* in the *Cadman* action for a declaratory judgment, made "findings", "adjudications" and "determinations" in respect of all of the issues and as to all of the parties in this action, barring any relief herein. It is the basic fallacy of these opinions, rather than their details which is important here.

That the proceedings before Judge Dimock constituted a violation of procedural due process and a departure from the accepted course of judicial proceedings is apparent from a reading of the minutes of the "trial" (R. 1903

et seq., as well as of the pre-trial proceedings. Petitioners' necessarily brief summary of these (Petition 7-9, 37-44) could be documented in depth.

Respondents, and the Courts Below, Have Ignored the Applicable Rules of *Res Judicata* and Collateral Estoppel and the Limitations Thereof Peculiar to Declaratory Judgments

Respondents erroneously argue, as to *res judicata*, that declaratory judgments are like other judgments and because the *opinion* of the Court of Appeals in *Cadman* did not carry a "declaratory judgment label" it was nonetheless a declaratory "adjudication", and "*res judicata*" (Res. Br. pp. 20-21).

Actually, there are, generally and in New York, certain recognized limitations peculiar to declaratory judgments in so far as the applicability of *res judicata* or collateral estoppel are concerned (10 A.L.R. 2nd, 782, 783).

A declaratory judgment is not *res judicata* on an issue not determined thereby. The *res judicata* effect of a declaratory judgment depends upon the scope of the declarations of rights made by the judgment. As to matters not declared by the judgment, the parties are not so precluded, although a declaration might have been made as to such matters (10 A.L.R. 2d 782, 784, 786, 787; Petition, pp. 25-31).

The rule is stated in Restatement, Judgments, in Comment *b* to §77 as follows:

> §77(b). *Effect of declaratory judgment on subsequent controversies.* The effect of a declaratory judgment in subsequent controversies between the parties depends upon the scope of the declaration of rights made by the judgment. As to matters

declared by the judgment, the parties are precluded from relitigating them; *as to matters not declared by the judgment, although a declaration might have been made as to them, the parties are not so precluded.*

"Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant. He is seeking rather a judicial declaration as to the existence and effect of a relation between him and the defendant. The effect of the judgment, therefore, unlike a judgment for the payment of money, is not to merge a cause of action in the judgment or to bar it. The effect of a declaratory judgment is rather to make res judicata the matters declared by the judgment, thus precluding the parties to the litigation from relitigating these matters." (Emphasis supplied.)

The *Cadman* final judgments (pp. X14-X21) contain no findings, declarations, determinations or adjudications as to the merits of the claims made or the declaratory relief sought in the complaint or in counterclaim. The Court of Appeals had no power to do so by "judgment" or "opinion". The Appellate Division refused to do so.

Accordingly, *res judicata* was not applicable here.

Res Judicata and Collateral Estoppel are Doctrines of Bar or Estoppel by Judgment, Not by Opinion

This is the law under the decisions of New York and this Court (Petition, p. 30; *Ripley* v. *Storer*, 309 N. Y. 506, 512, 513; 132 N.E. 2d 87 (1956); *Rudd* v. *Cornell*, 171 N. Y. 114, 128-9, 63 N.E. 823 (1902); *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 326; Restatement, Judgments, Ch. 3 "Introductory Note, pp. 157 *et seq.*, §§41-49, 68.

Respondents' brief again makes it crystal clear that they rely solely and wholly for their plea of *res judicata*, on statements in the *opinion* of the Court of Appeals in *Cadman*. Respondents eschew the *judgments* in *Cadman* (X14-X21), as did the courts below.

Respondents say: "The *opinion* of the New York Court of Appeals in the *Cadman* case * * * makes it clear that the *Cadman* decision is *res judicata* as to the present action in accordance with the very principles of *res judicata* cited by petitioners." (Res. Br. pp. 17-18); and, "Further, the *opinion* of the New York Court of Appeals was full in *its* coverage and disposition of all claims advanced by plaintiffs"; and that because this opinion "did not carry a declaratory judgment label" is immaterial (Res. Br. p. 21).

But, in actual truth, under the "very principles of *res judicata*" cited by petitioners, this reliance on statements in that opinion for the claimed "findings" and adjudications to support *res judicata* or estoppel by judgment, is clearly erroneous and a deprivation of due process of law.

Elsewhere respondents argue (Res. Br. pp. 7-8) that "two claims were asserted and adjudicated in the *Cadman* case". It then develops (Res. Br. pp. 8-10) that these two so-called "adjudications" and "findings" are statements from the *opinion* of the Court of Appeals.

Respondents state: (Res. Br. pp. 18) "The Court of Appeals, like the District Court, gave the closest examination to the 'full' opinion of the New York Court of Appeals and necessarily found that it was, as that court stated, a determination on the merits".

Reference to the opinions of the courts below shows that they relied, fallaciously, entirely on statements made in the *opinion* of the Court of Appeals, which they con-

strued as "findings", "adjudications" and "determinations" (Petition, p. X-11, 13a-14a, 15a-16a, 18a-19a, 20a). (Of course, The District Court went even further and made findings in respect of facts which arose *after* the *Cadman* case (21a-34a) even though there was no trial in respect thereof.)

The rule that *res judicata* and collateral estoppel are doctrines of estoppel by *judgment* and not by *opinion* is even more strictly applied in declaratory judgment actions, since, in those actions, the findings and declarations relied upon as a bar must be set forth in the declaratory judgment itself.

The Judgment in *Cadman* Did Not Adjudicate on the Merits the Issues Presented Therein and Was Never Intended to Do So; and, Cannot, Under Due Process of Law, Constitute a Bar to This Action

Respondents rely heavily (Res. Br. pp. 7, 21) on the expression in the majority opinion in *Cadman* (159b) that "the complaint was properly dismissed on the merits". This expression was plainly erroneous. It does not appear in the order and judgment entered thereon (X-17-X19; 166b-172b). It obviously was never intended to bar another declaratory judgment action, in light of the statements in the two immediately preceding sentences (159b), that the declaratory judgment remedy "is available" in an "appropriate action" in which the named absent parties were brought before the Court.

Furthermore, the complaint had not, in fact, been dismissed "on the merits" by the Appellate Division. This is perfectly plain from the order of reversal of the Appellate Division (143b-145b); and the judgment entered thereon (145b-147b; Petition, Appendix E; pp. X14-X16) which

was affirmed by the Court of Appeals (159b; 167b; 170b; 172b); and from the order of the Appellate Division (135b-136b) which *specifically* denied defendants' motion to resettle said order of reversal by having it provide for a dismissal of the complaint "on the merits" (134b, Par. 6).

That the dismissal was not on the merits is *obvious* from *every* opinion, majority and minority, in *Cadman* (122b-124b; 138b-141b; 159b; 159-163b).

Respondents' also, cite several cases (Res. Br. p. 20) for the statement that "Under New York law a dismissal of a complaint for a declaratory judgment is, as in any action, in and of itself sufficient to constitute res judicata".

This is legally erroneous and not supported by the cases cited, two of which, *Bauer* and *Cold Metal*, are not New York cases.

The *Terraqua*, *Campbell*, *Bauer* and *Cold Metal* cases involved dismissals of complaints in the earlier actions, for *legal insufficiency* or want of equity.

The *Cadman* complaint was not dismissed for legal insufficiency. Even if the *judgment* in the prior action after trial specifically recites a dismissal "on the merits", such judgment does not bar the maintenance of another action for the same relief, where such dismissal was not, actually, on the merits. Section 482, N. Y. Civ. Prac. Act has not affected this rule. *Greenberg* v. *DeHart*, 4 N. Y. 2d 511, 514, 515 (1958); *Mink* v. *Keim*, 291 N. Y. 300, 303-4 (1943).

Contrary to Respondents (Res. Br. pp. 20-21), under New York law, the fact that a judgment does not specifically incorporate the words "without prejudice" does not mean that it was "with prejudice". Recourse to the record always may be had to show the true fact. *Sarama* v.

Sarama, 261 App. Div. 875 (4th Dept., 1941); *Overseas News Agency* v. *Overseas Press*, 185 Misc. 1010, 1011, aff'd 270 App. Div. 754 (1st Dept., 1946). See, generally, 17 Am. Jur. §105, p. 174 and cases cited.

All of this has been made abundantly clear by the very recent New York decision in *Brown* v. *Bullock*, 17 App. Div. 2d 424 (1st Dept., Dec. 20, 1962), wherein the complaint in the state action was dismissed "with prejudice", but the Appellate Division held that such a dismissal could not bar, on principles of *res judicata*, an identical action in the Federal Court. It stated at p. 428:

> "A complaint dismissed for lack of jurisdiction * * * is dismissed with prejudice. That means that the plaintiff cannot further present his claim in the courts of this State. *But it is not an adjudication of the merits of his claim, and obviously is no bar to prosecution of the suit in the proper jurisdiction.*" (emphasis added.)

So here, the dismissal of the *Cadman* case for lack of jurisdiction to grant effective declaratory judgment relief for absence of indispensable parties, did not preclude even an identical action in the state or Federal courts, where those parties were made present.

A judgment for the defendant is not on the merits where, as in *Cadman*, it is based merely on rules of procedure (i.e., §473 and 193 N. Y. Civ. Prac. Act) rather than on rules of substantive law. Restatement, Judgments §49a. If a judgment, as in *Cadman*, determines only that the plaintiff is not entitled to recover in the particular action, it is not on the merits—as where the judgment of dismissal is based on the lack of jurisdiction of the court over the subject of the action due to non-joinder of parties Restatement, Judgments §§49a, 52(g).

Such a dismissal leaves the merits unconsidered and undisposed of, and is not a bar to a subsequent action. 17 Am. Jur. "Dismissal" §95, pp. 164-5.

The *Cadman* case did not decide "nothing" (Res. Br. p. 18); but once the courts therein decided they were without jurisdiction to render any declaratory judgment as prayed for they should not have gone on to discuss any phase of the merits of the case and such discussion was *dicta*.

The Appellate Division, apparently with this in mind, specifically refused, on defendants' motion, to embody in its decision or judgment any findings or adjudications based on statements in its opinion (127b-134b, 135b-136b).

This is the very criticism that was justifiably made of the unfortunate majority opinion in *Dred Scott* v. *Sanford*, 19 Howard (60 U. S.) 393, 589, because "such an exertion of judicial power transcends the limits of the authority of the court."

As Mr. Justice Holmes pointed out in *Murray* v. *Pocatello*, 226 U. S. 318, 324 (1912), "if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were"; and "when jurisdiction to grant equitable relief was denied the ground of the merits could not be reached." (See, also, Petition, p. 19.)

Defendants' Positions Here and in *Cadman* are Totally Inconsistent

Respondents have the temerity to assert now, that the "General Council was the only necessary defendant" in the *Cadman* case (Res. Br. p. 19); and that there was no absence of an essential party in *Cadman* and the complaint therein was not dismissed "for lack of any essen-

tial party" (Res. Br. p. 18). Those statements are *completely contrary* to the assertions made in *Cadman* by defendant General Council (herein represented by the same attorneys).

In order to avoid any possible confusion, and to rivet this gross inconsistency, the petitioners annex hereto the text of defendant's motion to dismiss, which was granted in *Cadman*, and of the arguments in its briefs, wherein the General Council, repeatedly, asserted just the exact opposite position (Exhibit G, hereto, pp. X25-32; 405a-414a). Moreover, respondents' present statement is directly contrary to every opinion written by the appellate courts in *Cadman*, wherein defendant's above argument was accepted and followed.

In the same vein, respondents boldly assert "The image which plaintiffs thus see is only the reflection of their own attempt to play fast and loose between two courts" (Res. Br. p. 21). In *truth*, it is respondents who are engaging in such tactics, as Exhibit G attests. (See, also, Petition p. 34.)

In *Cadman*, the General Council raised every possible technicality to avoid an adjudication on the merits, and succeeded by its oft-repeated claim that the court there had no power to grant a declaratory judgment in absence of numerous parties defendant whose interests, it said, were not severable and would be inequitably effected by such a judgment. Now the General Council and the other defendants claim *res judicata*, based on *Cadman* and that all essential parties *were* present there!

Plaintiffs never claimed, in *Cadman* or in this case, that the Congregational corporate boards were agencies of the General Council or that any principal-agent relationship existed between the General Council and them. In

the complaints, and throughout both cases, plaintiffs asserted that these corporate boards were the agencies of the Congregational Christian Churches (11b-14b; 88a-89a). The constitution and by-laws of the General Council so states (12b; 76a-77a). There was no proof in the *Cadman* case of any such principal-agent relationship and there is none in this action. Defendants have denied any such relationship (e.g. Exhibit G, hereto, v. X-29).

Legal Authorities Cited by the Respondents and the Courts Below Do Not Support the Proposition Asserted by Them

In asserting (Res. Br. p. 21) that all defendants herein are entitled to the benefit of the *Cadman* "adjudication", regardless of whether they were bound by it, respondents cite *Israel* v. *Wood Dolson*, 1 N. Y. 2d 116 and *Gart* v. *Cole*, 263 F. 2d 244; cert. den. 359 U. S. 978. The same cases have been cited by the courts below (19a, 15a, X-13).

Neither of the cases is applicable or justifies the dismissal below.

The New York Court of Appeals held that Israel, having failed to prove a breach of contract on the part of Wood Dolson in the first case, was estopped from relitigating the same question in his later suit against Gross for inducing that breach. Nothing said in Israel would bar the litigation of issues never decided in *Cadman*.

The Court in the *Israel* case merely established another *test* for the application of *res judicata*—identity of issues. It did not extend the scope of the doctrine of *res judicata*.

The facts of this case call for the application of entirely different legal principles. This action does not involve a situation in which the liability of the present defendants

is "altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts." *Good Health Dairy Products Corp.* v. *Emory*, 275 N. Y. 14, 17 (1937), *Lawlor* v. *National Screen Service*, 349 U. S. 322 (1955).

The liability of the absent Congregational boards and agencies to these plaintiffs exists by reason of their own actions and is in no way dependent upon the actions of the General Council whether or not such actions were "exonerated" by the *Cadman* courts. The *Israel* case, by its own language, created no new class of exceptions to the law of New York and is no authority for permitting the absent defendants to claim the benefits of *res judicata*. The question is—are the adjudicated issues identical? The answer is—no (Petition pp. 31-33).

Nor is the case of *Gart* v. *Cole*, *supra*, applicable. On the contrary, the Court in that case went so far as to state that no attempt could be made to afford the defendant Cole, under the principles of *res judicata*, the benefits of the earlier decision because he had not been a party to the earlier case. It stated:

> "No determination by the state court negating the commission of any wrong by the administrator could be binding in his favor because he was not a party" (p. 134).

The courts below also held (X-13) that all the respondents here who were not parties to *Cadman* have the same "interests" as the General Council. That just is not so and if there had been a trial below, the contrary would have been shown. Respondents other than the General Council do not sustain to each other and to it a relationship which, under New York law, permits them to "claim

the benefits of" the *Cadman* decision. If they had any such relationship, the *Cadman* complaint would not have been dismissed for want of their presence there as parties (See, also, Appendix G, hereto, pp. X25-X32). This is strikingly true of respondent Evangelical and Reformed Church, and of United Church of Christ which did not exist when *Cadman* was tried. As to all the respondents, significant are the principles recognized and applied by this Court in the recent decision of *Lawlor* v. *National Screen Service*, 349 U. S. 322, 329; 330 (1955).

CONCLUSION

Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX TO
REPLY BRIEF FOR PETITIONER

APPENDIX G

Excerpts from Record and Defendant-Appellant's Briefs in *Cadman* v. *Kenyon*

(See pages 405a-414a of "Appendix to Plaintiff's-Appellants' Brief" herein in the United States Court of Appeals, submitted with Petition)

Ground of defendants motion to dismiss complaint.

"8. This Court is without power or jurisdiction to make an effective determination of this action as prayed by the plaintiffs, because of the absence as parties of persons, bodies and corporations indispensable and necessary to an effective determination, or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the Court. Such absent parties, one or more are

(a) The Evangelical and Reformed Church,

(b) The General Synod of the Evangelical and Reformed Church,

(c) The Corporation for The General Council of the Congregational Christian Churches of the United States,

(d) The American Board of Commissioners for Foreign Missions,

(e) The Board of Home Missions of the Congregational and Christian Churches and the various corporations of which the Board last named is alleged in paragraph 22(c) of the complaint to be 'the agent',

(f) The various other 'local or national Boards, agencies, corporations, commissions and instrumentalities for the promotion of the work of the Congregational Christian Churches referred to in paragraph 22(f) of the complaint'.

(g) The several independent Congregational Christian Churches from whom the complaint, by its prayers for judgment, Nos. 4, 6 and 7, proposes to take away what it denominates as rights and interests, including the property rights and interests."

(This statement appears at page 10 of Defendant's Appellate Division Brief; at page 14 of Defendant's Court of Appeals Brief; at pages 1328 and 2516-17 of the Record on Appeal)

Quotations from the brief filed by defendant, General Council in the Court of Appeals of the State of New York in *Cadman v. Kenyon:*

"The Sole Parties

This action is solely between two parties. No other parties were named." (at p. 2)

"POINT I

The Appellate Division was fully justified in holding that this action for declaratory judgments could, in a legal sense, serve no 'legitimate purpose': and that this case fell within the line of decision by this Court of Appeals holding that, under circumstances even less compelling than the present, 'a court may, and ordinarily must, refuse to render a declaratory judgment.'" (at p. 66)

Under this point heading defendant stated: (at pp. 66-7)

"The complaint professes a single cause of action in equity under section 473 C. P. A. It prays for six declaratory adjudications and also for a resultant permanent injunction affecting the rights and interests not only of the sole defendant but also of various corporations, boards and missions, of the local churches and their members, and of The Evangelical and Reformed Church.

In its opinion the Appellate Division declared (9506):

'A declaratory judgment serves a legitimate purpose only when all persons who may be affected thereby and who may question in a court the existence and scope of the rights declared are parties to the action and have opportunity to be heard. A court may, and ordinarily must, refuse to render a declaratory judgment in the absence of such parties. (*Manhattan Stor. & Warehouse Co. v. Movers Assn.*, 289 N. Y. 82; *Wood v. City of Salamanca*, 289 N. Y. 279).'

In the first of these cited decisions this Court of Appeals said (289 N. Y. 82, 88).

'An action for a declaration of "rights" and "legal relations" in accordance with section 473 of the Civil Practice Act serves a *legitimate purpose* where all persons who are interested in or might be affected by the enforcement of such "rights" and "legal relations" and who might [2876] question in a court the existence and scope of such rights, are parties to the action and have opportunity to be heard. As to persons who are not parties a declaratory judgment would be a mere academic pronouncement without juridical consequences, but which might be embarrassing if attempt is made thereafter to enforce these rights

in legal proceedings to which they are parties. *A court may, and ordinarily must, refuse to render a declaratory judgment in such case.* (*Post v. Metropolitan Casualty Ins. Co.*, 227 App. Div. 156.)' (Italics ours.)

See also for like statements: *New York Operators v. State Liquor Authority*, 285 N. Y. 272, 276; *Gilligan v. Cunningham*, 273 App. Div. 1046; and *Bach v. Grabfelder*, 233 App. Div. 773.

"POINT III

Furthermore and aside from the principles of discretion, policy and law applicable to actions for declaratory judgment, the dismissal of the complaint was required by Section 193 C. P. A.

That Section, in accordance with the former equity rule, requires that an action cannot be maintained and a judgment cannot be entered, where there are other parties 'whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the Court.'" (at p. 93)

On page 98 of this brief, under said Point III, defendant again listed the indispensable and necessary parties, listed in its motion to dismiss, *supra*, p. X25-X26, whose absence, it stated, required a dismissal of the case.

POINT VI-B

The claim that the court's jurisdiction in the matter of these non-defendant corporations can be rested on the theory of an alleged 'agency' for the

sole defendant (the General Council) is fallacious and begs the relevant questions.

(1) All these corporations are vitally 'interested in' and would be 'affected by' an adjudication of such agency. (§193 C.P.A.; *Manhattan Stor. & Ware. Co. v. Movers Assn.*, 289 N. Y. 82, 88; and Points I, II and III, pp. 66, 77, 93, *supra.*)

No court can lawfully make adjudications against the liberties and the property of a third person, or against charter powers of a corporation, not before the court, or predetermine that its property would 'be alienated or diverted' (301) from lawful purposes, by any unilateral judicial declaration or decision that such third person or corporation is 'an agent' of the defendant." (at p. 125)

Quotations from the brief filed by the defendant, General Council in the Appellate Division, Second Department of the Supreme Court of the State of New York in the case of *Cadman v. Keegan.*

"The Sole Parties

This action is solely between two parties. No other parties were named or served with process, and no other parties appeared or intervened." (at p. 2)

"(1) There are only two parties to this action, to wit: the Cadman Church (16) and the General Council (16-18). Over them alone did the Court below have jurisdiction." (at p. 98)

"Twelve Corporations and Boards Which Were not Parties to the Suit but Are En-

Appendix G

joined by the Judgment as to the Use of Their Property

The judgment below enumerates by name, in paragraph 'S', twelve corporations as follows (299):

(a) The Corporation for the General Council of The Congregational Christian Churches of the United States (Conn.);

(b) The American Board of Commissioners for Foreign Missions (Mass.);

(c) The Board of Home Missions of the Congregational and Christian Churches (Mass., Conn. and N. Y.);

(d) The American Missionary Association (N. Y.);

(e) The Congregational Home Missionary Society (N. Y.);

(f) The Congregational Church Building Society (N. Y.);

(g) The Congregational Sunday School Extension Society (N. Y.);

(h) The Congregational Board of Ministerial Relief (Conn.);

(i) Congregational Education Society (Mass.);

(j) Congregational Publishing Society (Mass.);

(k) The Annuity Fund for Congregational Ministers (N. J.);

(l) The Retirement Fund for Lay Workers (N. J.).

No one of these corporations or boards was a party to this litigation.

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"POINT II

Under both the common law and the Federal and State Constitutions the Court below was without jurisdiction or lawful power to impose on twelve charitable and religious corporations, none of which was a party to this suit, permanent injunctions not only not confined to the 'Basis of Union' but extending in perpetual jurisdiction over the entire spiritual and ecclesiastical principles, corporate actions and properties of these religious bodies for the rest of time." (at p. 90)

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POINT III-A

The Court below has cast in judgment foreign and domestic missionary and charitable corporations not before it." (at p. 98)

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"Moreover, as recognized in Section 193 C. P. A., a court is without jurisdiction to render a judgment even as between the parties actually before it, if there is some other person 'whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court'. In such case, the absent person 'is an indispensable

party',—indispensable both to jurisdiction and to judgment." (at pp. 100-1)

In Point I (pages 2-5) of the "Reply Brief for Defendant-Appellant" in the Appellate Division, this same argument was reiterated at considerable length in varying language and concluded with the statement that "The absence of these corporations as parties was one of the specific grounds of the defendant's motions to dismiss."

Also, this same argument was made in defendant's trial brief.